Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-6853

ALTON JAMES HENDERSON, Petitioner	In Forma Pauperis
V.	From North Carolina
STATE OF NORTH CAROLINA, Respondent	State Court Decision

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NORTH CAROLINA .

APPEARANCES

We, and each of us, hereby enter appearance in this Court in this cause on behalf of, and as counsel for, Petitioner, Alton James Henderson.

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[redacted]

CERTIFICATE

This is to certify that the attached Petition for Certiorari, along with In Forma Pauperis Petition and Affidavit, were this day served upon all parties hereto by depositing three copies of the same in a United States Postal Service mailbox, with first class postage prepaid, addressed to counsel of record for the respondent, viz., Attorney General of the State of North Carolina.

This 7th day of June 1974.

W. R. Dalton, Jr.
Attorney for Petitioner

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State Court Opinions attached:
- State v. Henderson
- State v. Jarrette
- State v. Waddell
- State v. Britt

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes your Petitioner, the defendant below, who respectfully shows unto the Court as follows and respectfully petitions the Court that a Writ of Certiorari issue to the end that the judgment and opinion of the Supreme Court of North Carolina, hereinafter described, be reviewed by the Supreme Court of the United States:

WHERE OPINION REPORTED

The Opinion is reported as STATE OF NORTH CAROLINA VS. ALTON JAMES HENDERSON in _____NC_____, 203 SE2d 10. The companion cases, the opinions of which were adopted by reference, are reported as STATE OF NORTH CAROLINA V. JARRETTE, _____NC _____, 202 SE2d 721, and STATE OF NORTH CAROLINA V. WADDELL, _____NC_____, 194 SE2d 19. Copies of said opinions are attached.

JURISDICTIONAL GROUNDS

1. Under North Carolina practice the decision and the opinion are the same document, and the date of said document is 13 March 1974 and that is the date of entry.

2. The statutory provision believed to confer jurisdiction is 28 USCA Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Where defendant refuses to answer questions without a lawyer present, and he is exhibited singly less than twelve hours later before the victim in the presence of the District Attorney, with no lawyer present for the defendant, does the fact that the exhibition occurred prior to issuance of a warrant make such confrontation constitutionally permissible under the Sixth and Fourteenth Amendments?

2. Where defendant attacks an at-trial identification because of improper out-of-court confrontation, and neither side at voir dire offers evidence as to the hour when the Warrant of Arrest was issued, but the record shows it was issued the same day as the out-of-court confrontation, and it further appears that there had been no prior identification, and the trial judge makes no findings of fact on the point, does KIRBY V. ILLINOIS 406 US 682 permit the adoption of arule that there is a presumption the confrontation preceded the issuance of the warrant and thereby preceded the commencement of adversary proceedings?

3. When the show-up occurs after the date of STOVAL V. DENNO, 388 US 293 and the defendant is and has been in custody and the victim is a local resident locally employed and there has been no reason advanced as to why a delay for a line-up would prejudice the State, is the use of a "show-up" instead of a line-up constitutionally permissible under the Due Process Clause of the Fourteenth Amendment?

4. When an out-of-court identification is tainted, and the trial judge finds that the in-court identification can be separated from it, can a State

Appellate Court constitutionally apply the local rule of evidence that such findings cannot be attacked if "supported by competent evidence" or does the case of UNITED STATES V. WADE, 388 US 212 apply to the State as well as Federal cases and require that the trial court findings be supported by "clear and convincing" evidence?

5. Can the evidence be "clear and convincing" within the meaning of UNITED STATES V. WADE, 388 US 212 (and can the rule of NEIL V. BIGGERS, 409 US 188 requiring indicia of reliability under the totality of circumstances be met) when the victim admitted that she hesitated for "five minutes" before identifying defendant at a single exhibition because it took that long for her to be sure, and the undisputed evidence also shows:

   a. There was no light burning in the room where she saw the attacker.

   b. That although the defendant lived two or three trailers from the victim, and she had seen him about fifteen times before at a distance, she did not recognize him at the time.

   c. That the outside light was not bright enough for her to distinguish the color of the attacker's clothes or the kind of collar he was wearing.

   d. That she uses glasses which she did not have on at the time.

   e. The prosecuting attorney was present at the show-up and the defendant was without counsel when the police brought the defendant before the victim and said "Is that the man?"

   f. A written statement given the police by the victim immediately after the attack and while the police were looking for the attacker contains no description of the attacker.

6. Is the penalty of death a cruel and unusual punishment within the prohibition of the Eighth and Fourteenth Amendments when it is imposed (a) upon a defendant convicted of rape or burglary, or (b) upon such a defendant in a case where the victim suffered only transitory injuries in the form of a knot over her right eye, a bruise over each eye, a swollen lip, and red marks on her throat?

7. Where mandatory death sentence statutes enacted in 1868 were amended in 1949 by other statutes providing that life imprisonment shall be the sentence if the jury in its unbridled discretion so recommends, do the Eighth and Fourteenth Amendments (as interpreted by FURMAN V. GEORGIA, 408 US 238) require that the discretionary proviso rather than the mandatory death sentence provision must fall?

8. Where data susceptible to judicial notice show that during a twelve month period in North Carolina slightly more than 13 people were tried for capital offense Rape and that during a corresponding but earlier period of twelve months there were 738 Rape offenses reported in the State, and the law of North Carolina gives the prosecution absolute discretion, free from supervision of any court or administrator, to

   a. refuse to submit a capital bill to the grand jury.
   b. ask for an indictment charging a lesser offense.
   c. try the accused for a lesser included offense only.

   is such a showing sufficient to establish a constitutional impediment under the Eighth and Fourteenth Amendments to the use of death sentences for Rape in North Carolina unless and until judicial control over such discretion is established?

9. Where data susceptible to judicial notice show that during the year 1972 there were only 10 convictions for first degree burglary in North Carolina but that 39,210 burglaries and housebreakings were reported during the same year, and the law of North Carolina gives the prosecution absolute discretion, as aforesaid, is such a showing sufficient to establish a constitutional impediment under the Eighth and Fourteenth Amendments to the use of death sentences for Burglary in North Carolina unless and until judicial control over such discretion is established?

10. If capricious or discriminatory exercise of discretion by District Attorney must be established by proof of actual examples in order to invoke the constitutional ban against cruel and unusual punishment contained in the Eighth and Fourteenth Amendments, do the cases of ASHTON V. KENTUCKY, 384 US 195 and UNITED STATES V. EVANS, 333 US 483, require that the defendant be relieved of such a burden and that it be placed upon the State?

11. Does the Due Process Clause of the Fourteenth Amendment or the Jury Trial Provision of the Sixth Amendment permit a State court death sentence to be predicated upon a verdict rendered by a jury which did not know for certain that the consequences of a guilty verdict was a sentence of death and a request for this information was denied?

12. Do the Eighth and Fourteenth Amendments, as interpreted by FURMAN V. GEORGIA, 408 US 238, in order to prevent covert exercise of discretion in favor of the accused, required that the trial court refrain from informing the jury that a guilty verdict means a death sentence, even when the information is requested?

13. Do the Equal Protection of Law and Due Process Clauses of the Fourteenth Amendment prohibit the adoption and use in capital cases in State courts of a rule of practice which denies a defendant who asserts an alibi (but is inapplicable to defendants who do not) the right to rely on the weakness of the State's evidence concerning corpus delicto and the right to have the jury charged concerning lesser included offenses

14. When the police remove from defendant's clothing two long blond hairs, apparently the same or similar color as the hair of the victim and

also of defendant's daughter, and the prosecution introduces the hairs in evidence and argues that they belong to the victim, was the failure of the prosecution in a capital case to have the hairs microscopically compared with the hairs of the victim unconstitutional "suppression of evidence" within the meaning of the Fair Trial requirement of the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death. Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (GS 14-21)

> "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death; Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the Court." (GS 14-52)

STATEMENT OF THE CASE

Petitioner was tried for both Rape and First Degree Burglary in a State Court of North Carolina. There was a verdict of guilty in both cases (R. p. 12), and a sentence of death by asphyxiation of gas was pronounced. (R. p. 13). Petitioner appealed to the Supreme Court of North Carolina and the judgment was affirmed on 13 March 1974.

On 25 March 1974 the Hon. William H. Bobbitt, Chief Justice of the Supreme Court of North Carolina, stayed execution of the judgment pending further orders of the court in order to give Petitioner an opportunity to file a petition for a Writ of Certiorari in this Court.

1. Material Facts.

The prosecuting witness lived in a trailer. About 10:30 P. M. she was awakened by a barking dog. She looked up and saw an intruder standing in the door of the bedroom. There was no light burning in the bedroom, but some light did enter from an adjoining room and from the outside. The intruder used force upon her and accomplished sexual connection. No weapon was used and no permanent injury was inflicted. There was no evidence of damage to the genital area and a medical report (not introduced in evidence) states that the doctor found "no signs of forced entry." There were bruises over both eyes, a knot over one eye, and red marks around her throat.

The prosecuting witness admitted that she eventually submitted to the attacker and that she chatted with him amiably for thirty minutes after the event. She did not state that she submitted from either fear or exhaustion, and the defendant claimed on appeal that a case of rape had not been made out. The Supreme Court of North Carolina held that the jury could infer fear from the nature of the violence. The defendant made a second contention that the jury could infer absence of fear from failure to so testify and that consequently a lesser included offense should have been submitted to the jury. The Supreme Court of North Carolina held that by asserting an alibi the defendant could not rely on the weakness of the State's case as to the "corpus delicti", and cannot complain because the Court did not submit a lesser included offense to the jury.

The prosecuting witness testified that all the doors were locked. She predicated this testimony, not upon actual recollection, but upon the fact that

it was her invariable habit to always lock all doors, because she had a phobia about unlocked doors. However, sheha d not retired for the night but was lying on top of the bed in a robe preliminary to going into the kitchen when she feil asleep. The investigating officer reported no evidence of force being applied to the doors or the locks, and the prosecuting witness noticed no such signs when she used the doors after the event. The Supreme Court cf North Carolina held that thus testimony was sufficient to support a finding by the jury that all the doors were closed. To the contention of defendant that absence of signs of force was sufficient to support a finding that the victim had overlooked locking at least one door and that at least one of the doors was open and that a lesser included offense should have been submitted to the jury, and the jury should have been instructed that if the defendant entered through an open door there was no "breaking", the Supreme Court of North Carolina again held that by asserting an alibi the defendant could not rely on the weakness of the State's case in regard to the corpus delicti.

Although the defendant lived only three doors away from the prosecuting witness, and had seen him from a distance ten or fifteen times before, she did not recognize him as her assailant. He was arrested because of his prior record and because his car was seen passing the vicinity right after the attack. After his arrest he was read the Miranda warning and refused to answer questions without a lawyer present. Questioning desisted but his clothes were examined and two long blond hairs found were introduced in evidence and argument was made to the jury that they belonged to the prosecuting witness. Defendant claimed they belonged to his daughter. No microscopic comparison was introduced in evidence. The Supreme Court of North Carolina held that failure to use microscopic comparison as evidence was not "suppression of evidence" within the meaning of the fair trial requirement of the Due Process Clause.

Less than 12 hours later the defendant, while still in jail, was presented singly to the prosecuting witness. No other people, except police officers and the District Attorney, were present. The witness looked at the defendant for "five minutes" before responding. Finally she identified him. She testified the delay on her part was caused by a feeling "I had to be sure."

On the same day as the out-of-court identification there was a warrant issued against the defendant. The record does not show whether this warrant was issued before or after the "show-up". The Supreme Court of North Carolina held that there is an inference that the warrant followed the show-up because there had been no prior identification and that, consequently, the burden was on the defendant to dispel the ambiguity and show that a charge was pending at the time of the show-up.

The record shows that the witness lives in the county, works in the County, and so remained from time of attack to time of trial. No reason was advanced as to why a "line-up" could not have been arranged. The Supreme Court of North Carolina held that these facts made it a close question of law as to whether or not a "show-up" was unconstitutional, but stated that it was not necessary to decide the question because the trial court found that the two confrontations could be disassociated from each other. The Supreme Court of North Carolina rejected defendant's contentions that such a finding had to be supported by "clear and convincing" evidence and held that the finding was binding on appeal if supported by "competent" evidence.

The Supreme Court of North Carolina held that the in-court identification, notwithstanding a prior possibly illegal out-of-court identification, nevertheless met the reliability requirements of NEIL V. BIGGERS and could be dissassociated because:

a. The witness testified at the trial that she was positive and would "not ever forget" the face that she saw that night.

b. There were three electric lights and a moon outside the trailer, and the witness testified "there was plenty of light for me to recognize the face that I saw."

c. She saw him for about an hour, and talked with him for about 30 or 35 minutes after the attack.

d. She testified that during this hour she observed him very closely so that she would be able to identify him later.

e. She testified that he had a distinctive hair-line, thin face, fine lips and dark hair, and that her identification was based not upon the "show-up" but upon his "hair-line, length of hair, eyebrows and lips".

f. She had identified no other person previously.

g. The identification occurred less than 12 hours after the attack.

The indicia relied upon by the Supreme Court of North Carolina (except for #3, #6 and #7) all fall within the category that Mr. Justice Powell calls "self-serving", and none of these indicia are directed to the question of why the witness, so sure at the trial, was not equally sure at the time the defendant was suggested to her at the show-up.

The defendant contended that the in-court identification did not meet the reliability requirements of NEIL V. BIGGERS, 409 US 188, 34 Led 2d 401, and that there was no "clear and convincing" evidence within the meaning of UNITED STATES V. WADE, 388 US 212, 18, Led 2d 1149.

In support thereof the record shows:

a. When the witness first saw defendant she hesitated for "five minutes" before identifying him because she wanted to be sure.

b. The witness lives only three doors from defendant, was on visiting terms with his wife, had seen him about 15 times from a distance, but did not recognize him as being her attacker at the time.

c. The light in the room of the attack:

(1) All came from outside sources.

(2) Was too poor to discern color of attacker's clothes.

(3) Was to poor to describe nature of attacker's shirt except that it was buttoned down the front and had short sleeves.

d. Immediately after the attack, before anybody had been arrested, and when it was in the interests of the police to find the attacker, the police took a written statement from the witness. NO WHERE IN THE STATEMENT IS THERE ANY DESCRIPTION OF THE ATTACKER'S FEATURES OR HIS CLOTHES.

e. For the following four hours the police continued to question the witness. But the testimony of the officers concerning prior consistant statements of the witness contains no indication whatever the witness was able to describe the attacker before the "show-up".

During the trial the jury broke their deliberations, returned to the courtroom, and the following colloquy occurred:

THE COURT: I understand the jury has a question?

FOREMAN: Yes, sir, we would like further instructions regarding punishment and whether or not we can make a recommendation.

THE COURT: First of all, I will instruct you that the penalty to be imposed is really not your concern. Your function is to pass on the guilt or not guilty asto both counts. So, I will not instruct you on what the penalty will be; that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You will find him guilty or not guilty, according to the evidence and the instructions I have given you.

The Supreme Court of North Carolina held that refusal to honor the above request was not constitutional error. The decision was probably predicated upon the contention of the Attorney General that ignorance had to be enforced as a consequence of STATE V. WADDELL, 282 NC 431, 194 SE 2d 19, which was based on FURMAN V. GEORGIA,

> "In short we would be returning to the pre-Waddell phase of our law by returning discretion to the jurors by allowing them to return a verdict of not guilty when they did not feel the death penalty should be imposed."

That is, the Attorney General contended that FURMAN V. GEORGIA prevented sub rosa exercise of discretion by a jury just as much as overt exercise of discretion. The Supreme Court of North Carolina upheld this result.

The Supreme Court of North Carlina in rendering STATE V. WADDELL had held that the decision was made obligatory by FURMAN V. GEORGIA.

That is, held that FURMAN V. GEORGIA required, pending legislative action, not that the death sentence be suspended but that the death sentence be made mandatory. Consequently, there is a real basis for assuming that the decision on this point was rendered in the belief that it was required by FURMAN V. GEORGIA; rendered in the belief that if the trial judge had honored the request of the jury, and it had been approved on appeal, then death sentences in North Carolina would again be subject to attack under FURMAN V. GEORGIA on the ground that jury discretion was being encouraged by State action.

2. Manner in which Federal Questions were Raised.

(Question No. 1)

Earlier Refusal of prisoner to answer questions, and presence of District Attorney at show-up, entitled prisoner to counsel and forbade identification testimoney in absence of such counsel, notwithstanding no warrant had issued.

a. In the trial court.

At trial defendant objected to in-court identification because of impermissible out-of-court confrontation. After the voir dire and adverse ruling defendant Excepted. The objections appear on pages 17 and 23 of the record on appeal; the exceptions appear on pages 22 and 23 of the record. Assignments of Errors are Nos. 3, 4 and 5 on page 71 of the record. Under North Carolina practice this presents for review all constitutional questions involved.

b. In the Brief.

"The record shows that when the police commenced to interrogate the defendant he objected because he did not have a lawyer present, having been advised of his right to counsel before answering questions. (R. p. 45). That is, the defendant made manifest that he wanted counsel if counsel would be of benefit to him. Nevertheless he was taken to the 'show-up' without counsel." (Brief p. 20)

"In this case the District Attorney was present at the time thereby demonstrating to the witness that the prosecution had sing led on the defendant as the culprit." (Brief p. 22)

c. In the Opinion:

"It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's Department, and that at the time of confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required presence of counsel for defendant." (p. 17)

(Question No. 2)

KIRBY V. ILLINOIS requires that the burden of showing existence or non-existence of adversary proceedings at the time of confrontation be placed upon the State and not the Defendant.

a. In the trial court: Not applicable. Appellate practice involved only.

b. In the Record on Appeal: Assignments of Error Nos. 3, 4 & 5.

c. In the Brief: Not applicable. Error occurred in the Opinion. But see following from Brief:

"The record shows that the warrant was issued on the same day that the out-of-court identification occurred, and that the latter occurred about 11:00 A. M. in the morning. (R. p. 3, 19). The record does not show at what hour the Complaint for arrest was filed. Nevertheless, it has been expressly held in this State that the burden of proof is on the State to show that all steps which are necessary to make the identification admissible were taken." (citing STATE V. WILLIAMS, 274 NC 328, 163 SE2d 253)

d. In the Opinion:

"The record does not indicate that any adversary judicial criminal proceedings had been initiated against defendant prior to the confrontation. The record does show that a warrant was served on defendant on the same day. There had been no previous identification of defendant. It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's department, and that at the time of the confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required the presence of counsel for the defendant." (p. 17)

(Question No. 3)

The Show-up was after STOVALL V. DENNO, 388 US 293, and the State would not have been prejudiced by a delay for a line-up.

a. In the Trial Court: Objections appear on pages 17 and 22 of the record on appeal. Exceptions to the rulings appear on pages 22 and 23.

b. In the Record on Appeal: Assignments of Error Nos. 3, 4 and 5 (R. p. 71)

c. In the Brief:

"It was further held in STOVALL V. DENNO, 388 US 293, 18 Led 2d 1119 and NEIL V. BIGGERS, 409 US 188, 34 Led 2d 401, that even though a confrontation be suggestive, it is not constitutionally fatal unless it was unnecessary -- that is, it is not fatal if it can be shown that to delay would have prejudiced the prosecution." (21)

"This confrontation, of course, occurred after STOVALL and the requirement of necessity is still in force." (21)

"There is nothing in the record to show any reason why delay could not have been had to assemble a line-up. Defendant was in jail and could not escape. The prosecuting witness was a resident of the county, employed in the county and remained in the county until the trial." (21)

d. In the Opinion:

"Here the fact that the single exhibition of defendant was held within a short time and as soon as feasible after the assault when the prosecuting witness had the opportunity to closely observe her assailant is counter-balanced by the fact that the defendant was in custody under circumstances which would have easily permitted the formation of a line-up. However, the facts of this case do not require a decision of this question....." (The Court then went on to state that decision was not necessary because the in-court identification could be disassociated from the show-up).

(Question No. 4)

The "Clear and Convincing Evidence" requirement of UNITED STATES V. WADE also applies to State Court trials.

a. In the Trial Court: Not applicable. Appellate practice involved only.

b. In the Record on Appeal:

Assignment of Error No. 5 on page 71 of the record reads as follows:

"5. That his Honor erred in ruling that the identification of defendant by witness was not tainted by any suggestions received at an earlier confrontation of the defendant and the witness, as shown by EXCEPTION NO. 5 (R. p. 23)

c. In the Brief:

"Although his Honor held that the State had carried the burden of disassociating the in-court from the out-of-court identification, there is no clear and convincing evidence to support this finding. (U. S. WADE, 388 US 212, 18 Led 2d 1149 at pages 1164, 1169, 1171). In fact, there is no evidence at all." (p. 23)

d. In the Opinion:

"When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by out-of-court identification(s) made under circumstances constitutionally impermissible, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence they are conclusive upon appellate courts." (p. 19) (italics added)

(Question No. 5)

The evidence below was not clear and convincing and did not establish that the in-court identification was reliable.

a. In Trial Court: Objections appear on pages 17 and 22 of the Record on Appeal. Exceptions appear on page 22.

b. In the Record on Appeal: Assignment of Error No. 5 (R. p. 71)

c. In the Brief:

"Although his Honor held that the State had carried the burden of disassociating the in-court from the out-of-court identification, there is no 'clear and convincing' evidence to support this finding. (U. S. V. WADE, 388 US 212, 18 Led 2d 1149 at 1164, 1169, 1171)" (23)

d. In the Opinion:

"The Court's findings on the critical facts were amply supported by competent evidence, and are therefore conclusive on this court." (19) (Italics added)

"We hold that under the totality of the circumstances the in-court identification of defendant was not tainted by the out-of-court confrontation." (19)

(Question No. 6)

Death for Burglary or Rape is unconstitutional per se.

a. In Trial Court:

THE COURT: Do you want to take exception to the imposition of this sentence on the grounds that it is contrary to the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment?"

ANSWER: Yes, sir." (R. p. 68)

b. In the Record on Appeal:

In the Assignment of Error on p. 74 of the Record appears the following:

"25. That his Honor erred in imposing a sentence of death for offenses none of which involved death or serious injury to another person, thereby violating the cruel and unusual punishment provision of the United States Constitution, as shown by EXCEPTION NO. 27 (R. p. 68)

c. In the Brief:

"Death for Burglary and non-injurious Rape is cruel and Unusual Punishment Per se." (p. 46)

d. In the Opinion:

"We have again carefully considered all of the arguments which were forecefully presentedby the defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in WADDELL and JARRETTE." (p. 27)

e. In Companion case of STATE OF NORTH CAROLINA V. JARRETTE: (202 SE2d 721)

"It is thus quite clear, both throughout North Carolina and throughout the nation, that there is a widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the amicus curiae that this widespread opinion, held by legislators, judges and jurors, is 'unenlightened.'" (p. 746)

(Question No. 7)

North Carolina Court felt compelled by FURMAN V. GEORGIA to strike the jury discretion provision of the statute and retain the death sentence provision.

a. In Trial Court:

THE COURT: Do you want to take exception to the imposition of this sentence on the grounds that it is contrary to the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment?

ANSWER: Yes, sir. (R. p. 68)

b. In the Record on Appeal:

Assignment of Error No. 25 (R. p. 74)

c. In the Brief:

"An amicus curiae brief filed by the North Carolina Civil Liberties Union Legal Foundation, Inc. (NCCLU) urged that judicial substitution of a 'mandatory' death penalty for the discretionary death penalty enacted by the General Assembly was (1) an improper application of the FURMAN holding. . . ." (p. 37)

"The Court in BLACKMON declined to review the question raised by the NCCLU amicus curiae brief because BLACKMON, like WADDELL, was not himself under an enforceable sentence of death. In that context, it observed that 'no persuasive reason appeared why the WADDELL opinion should be disturbed' (STATE V. BLACKMON); but it did not preclude reconsideration of WADDELL in an appropriate case." (p. 37)

"Appellant submits that the present appeal is an appropriate case for reconsideration of the severability question." (R. p. 37)

d. In the Opinion:

"In JARRETTE the Court re-affirmed the holding in WADDELL and answered all the viable contentions presented by defendant's brief and argument concerning the death penalty." (p. 27)

e. In Companion Case of STATE OF NORTH CAROLINA V. JARRETTE: (202 SE2d 721)

"The question was therefore presented, as a result of FURMAN V. GEORGIA, what part of GS 14-17 (murder) and what part of GS 14-21 (rape), if any, remains the law of North Carolina. That question came before this Court and was determined by us in State v. Waddell." (p. 740)

"The equal protection Clause. . . makes no distinction between sentences of death and sentences to imprisonment. . . If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, no matter how long or short." (p. 743)

"Having given full consideration to the brief and oral argument of the defendant and to the brief of the amicus curiae, requesting us to reconsider State v. Waddell, we now reaffirm that decision..." (p. 740)

f. In the Companion case of STATE OF NORTH CAROLINA V. WADDELL: (194 SE2d 19)

"It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the FURMAN decision; and it is quite clear that FURMAN strikes down the proviso." (p. 27)

"This (the proviso), and only this, is what Furman condemns as violative of the Eighth and Fourteenth Amendments." (p. 28)

Mr. Justice Higgins, however, did not see it as quite clear that FURMAN strikes down the proviso. In his WADDELL Concurring Opinion appears the following:

"This holding seem to be required in order that the Court may dig itself out of the hole it fell into by its holding that Furman 'strikes down the proviso as violative of the Eighth and Fourteenth Amendments.' Furman as I understand it.... strikes down the death penalty." (p. 44) (Italics added)

(Questions No. 8 and No. 9)

Prosecutorial Discretion in North Carolina invalidates death sentences.

a. In Trial Court:

THE COURT: Do you want to take exception to the imposition of sentence on the grounds it is contrary to the Eighth Amendment to the United States in that it is cruel and unusual punishment?

ANSWER: Yes, sir.

b. In the Record on Appeal:

Assignment of Error No. 25 (R. p. 74)

c. In the Brief:

"The administration of Justice in North Carolina causes and permits the death sentence to be imposed contrary to the criteria of FURMAN V. GEORGIA, and thereby imposes cruel and unusual punishment." (p. 46)

(because of)

"3. Prosecutorial Discretion." (p. 50)

"Defendant does not contend that the only remedy for this state of affairs (prosecutorial discretion) is for the Supreme Court to overrule FURMAN V. GEORGIA. Defendant concedes that if judicial control were exercised and the record showed that every decision to spare life were predicated upon difficulties of proof, the requirements of FURMAN V. GEORGIA would be met." (p. 53)

d. In the Opinion:

"We have again carefully considered all of the arguments which were forcefully presented by the defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in WADDELL and JARRETTE." (p. 27)

e. In Companion Case of STATE OF NORTH CAROLINA V. JARRETTE: (202 SE2d 721)

"To say....that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decision to seek convictions on capital charges in other cases are 'freakish' is a patent absurdity..." (p. 742)

(Question No. 10)

ASHTON V. KENTUCKY, 384 US 195, relieves Defendant of the burden of providing actual examples concerning selective or arbitrary exercise of discretion by the District Attorney.

a. In the Trial Court:

THE COURT: Do you want to take exception to the imposition of sentence on the grounds it is contrary to the Eighth Amendment to the United States Constitution in that it is cruel and unusual punishment?

ANSWER: Yes, sir.

b. In the Record on Appeal:

Assignment of Error No. 25 (R. p. 74)

c. In the Brief:

"It is the contention of the defendant that the case of FURMAN V. GEORGIA put the law into such a state of uncertainty that the death sentence cannot be applied to any offense occurring since that date without violating the Due Process Clauses of both State and Federal Constitutions." (p. 43)

"Defendant concedes that if the legislature hereinafter enacts new, or adopts or otherwise re-enacts the old statutes the

present vagueness will be dissipated. There is a presumption that every statute is constitutional and the public is put on notice that the legislature by such statutes finds that the impediments of FURMAN V. GEORGIA no longer obtain in this State and a transgressor violates at the peril of death. That is, the new statute may or not be constitutional in fact but it is no longer vague. Of course, however, such future statutes cannot operate to save the death sentence imposed on this defendant." (p. 45)

"Defendant complains that he does not have the information necessary to a determination of the above questions." (p. 50) (Re Gubernatorial Discretion)

d. In the Opinion:

"We have again carefully considered all of the arguments which were forcefully presented by defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in WADDELL and JARRETTE." (p. 27)

e. In Companion Case of STATE V. JARRETTE (202 SE2d 721):

"Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts." (p. 744)

(Question No. 11)

Death Sentence is unconstitutional when jury was not aware that death was mandatory upon conviction and its request for information on the point was denied by the Court.

a. In Trial Court: Not applicable. Under North Carolina law Exceptions to the Charge of the Court can be taken for the first time on appeal. (GS 1-282)

b. In the Record on Appeal:

Assignment of Error No. 22 on page 73 of the record reads as follows:

"22. That his Honor erred in instructing the jury: 'First of all, I will instruct you the penalty to be imposed is really not your concern. Your function is to pass upon the guilt or not guilt as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours.'" (R. p. 73)

c. In the Brief:

"Obviously, there are serious objections, both under the State and Federal Due Process Clauses and the State and Federal provisions

guaranteeing a jury trial, to a procedure where the decision as to whether a man shall live or die is made by persons who do not know the consequences of their decision; and where a juror is put in the position of unknowingly taking the life of another...."

d. In the Opinion:

"We hold that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary." (p. 23)

(Question No. 12)

FURMAN V. GEORGIA does not require, in order to prevent covert exercise of discretion by the jury, that the jury not be informed that a verdict of guilty would result in a mandatory death sentence when they request such information.

a. In Trial Court: Not applicable.

b. In Brief of Attorney General:

".....it is apparent that the probable effect of a jury instruction with reference to the death penalty would have the effect of influencing the jury in their determination of guilt or innocence. In short, we would be returning to the pre-Waddell phase of our law by returning discretion to the jurors by allowing them to return a verdict of guilty where they did not feel the death penalty should be imposed." (p. 33)

(NOTE: When Attorney General said "pre-Waddell" he also meant "pre-FURMAN" phase of the law. WADDELL is the North Carolina implementation of FURMAN V. GEORGIA).

c. In the Opinion:

"In WADDELL we said 'The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for instruction by the judge.'" (p. 23)

(Also see: "The punishment to be imposed not being a matter to be determined by the jury, defendant's counsel was not entitled to argue this question to the jury." (STATE V. DILLARD, 203 SE2d 6 at page 9))

(Question No. 13)

Depriving Defendant who asserts alibi of the right to rely on the weakness of the States evidence in a capital case violates the Equal Protection of Laws Clause and Due Process Clause of the Fourteenth Amendment.

a. In the Trial Court: Not applicable. Error first occurred in Opinion.

b. In the Brief and Record: Not applicable. Error first occurred in Opinion.

c. In the Opinion:

(1) RAPE

The defendant had contended that if the victim did not resist to the end, according to the common law he would be guilty of nothing greater than assault with intent to commit rape. The State's evidence shows that the victim and her attacker chatted amiably after the event. It also shows that there was no weapon, there was no evidence of injury to the genital area, and the victim had made the following statement to the police:

> "After I submitted he wasn't as rough. He must have been there at least thirty-five or forty minutes. He asked if he could come back again and I said not." (R. p. 41) (italics added)

At no point in her testimony did the victim state that she submitted by reason of fear. The defendant contended that this evidence of submission and lack of evidence of fear made it a jury question as to whether or not there was capital rape -- whether or not she submitted from fear.

The North Carolina Supreme Court held that the defendant could not rely on absence of testin ony concerning fear but had to have positive evidence of lack of fear because he had asserted an alibi:

> "Here all the evidence shows a completed act of intercourse. Defendant's defense is alibi. There was no evidence to support either of the lesser included offenses." (p. 25) (italics added)

(2) BURGLARY

The victim testified that she locked all of the doors; not from direct recollection but from the fact that such was her custom. The State introduced no evidence of any force being applied to the doors or the locks and the victim noticed no such force. The Defendant contended that absence of signs of force made it a jury question as to whether all the doors had in fact been closed; that consequently a lesser included offense should have been submitted to the jury; and the jury should have been instructed that if a door was open in the slightest there would have been no "breaking" necessary for the capital offense.

In an earlier case the Supreme Court of North Carolina had held that if the State relies on entry through locked doors, and it appears that no force had been applied to the locks or the doors, the case should be dismissed. (STATE V. MADDEN, 212 NC 56, 192 SE2d 859)

The MADDEN case, however, did not involve an alibi. The defendant there introduced no evidence. Consequently, the Supreme Court of North Carolina did not feel constrained by MADDEN, overruled the contentions above set forth, and adopted its previous statement in regard to rape concerning the effect of a claim of alibi.

> "Defendant without assignment of error argues in his Brief that the lesser included offenses of burglary should have been submitted to the jury. This argument must fail by virtue of the same authorities and reasoning upon which we overruled Assignments of Error 32 and 33. (p. 25) (italics added)
>
> "Defendant contends that the trial judge erred by failing to instruct the jury that if a door to the mobile home was open in the slightest degree, entering the trailer through that door would not be a 'breaking' (p. 34).... The record reveals no testimony which indicates that any door of the mobile home was open at the time defendant entered the trailer. Rather the uncontroverted evidence is that all three doors were locked prior to defendant's entry." (p. 24)

(Question No. 14)

Failure to introduce laboratory reports concerning hair and blood is "Suppression of Evidence."

a. In Trial Below: Not raised below.

b. In Record on Appeal:

Assignment of Error No. 23 on page 73 of Record reads as follows:

"23. That his Honor erred in failing to set aside the verdict and in letting the verdict stand when it appeared from the evidence that it was possible for the State to have exonerated the defendant, or conclusively proven his presence, by the simple expedient of having a laboratory examination of the hairs found on the defendant and the blood found on the pillow, as shown by EXCEPTION NO. 25 and EXCEPTION NO. 26 (R. p. 67), and as forbidden by the Due Process Clause of the 14th Amendment to the Constitution of the United States."

c. In the Brief:

"If the hair had been microscopically compared with another hair from the prosecuting witness, the State would have had either (1) conclusive evidence that the defendant was present at the scene, or (2) conclusive evidence that the hair found on his clothing was irrelevant to the case and that it would be improper to argue that it belonged to the prosecuting witness. Further, laboratory comparison of the defendant's blood with that on the bed clothing would have either (1) conclusively proven that the defendant was present at the scene of the attack, or (2) served as evidence tending to show that he was not present. It is the contention of the defendant that the State has a duty to establish the truth whether it hurts or helps the State and that a failure to take reasonable steps to establish the truth of highly pertinent facts deprives the defendant of a fair trial." (p. 34)

d. In the Opinion:

"Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. . . . They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error." (24)

ARGUMENT

(Question No. 1)

ESCEBEDO V. ILLINOIS and UNITED STATES V. ASH, notwithstanding KIRBY V. ILLINOIS, require that a lawyer be present at a pre-warrant line-up if (1) a lawyer is requested by the prisoner, or (2) the State has its chief legal officer present.

KIRBY V. ILLINOIS, 406 US 682, by its reference to ESCEBEDO, left open for future decision the question of whether a prisoner can be subjected to a line-up without a lawyer if he has asked for one.

Further, the case of UNITED STATES V. ASH, 413 US 300, indicates that if the prosecuting officer for the State is present prisoner's right to counsel then attaches either on the theory that such constitutes an exception to the "adversary proceedings" rule, or on the theory that such presence itself constitutes initiation of "adversary proceedings":

> "at these newly emerging and significant events, the accused was confronted, just as at the trial, by the procedural system, or by his expert adversary, or by both." (p. 310) (italics added).

Defendant concedes that a strong case can be made for the proposition that the burdens, financial and otherwise, placed upon local governmental units by a rule requiring a lawyer for every suspect routinely weeded out of the investigation process, outweigh the benefits to society of having all prisoners properly advised. And, in turn, defendant believes that the State will concede that, if the issuance of a warrant be the sole dividing line, warrants will always be deferred until all line-ups are completed and the requirement of counsel at line-ups will become a dead letter.

Without denying the possibility, upon full argument, of a more general formula which will resolve the above impasse, defendant believes that any eventual rule

will recognize the fact that counsel should be provided to a prisoner if (1) he has requested it, and (2) if the State has its legal officer present.

Prisoners who want a lawyer and who, for that reason or otherwise, attract the personal attention of the chief prosecuting officer for the State, are not mere grist for the elimination mill. Whatever be the commentary upon the wisdom of the public, the fact remains that most innocent people do not wish a lawyer for a line-up, and the one who does labels himself to the police as out of the ordinary, as more than a routine suspect. And, whatever be the commentary upon the diligence of the chief prosecuting officer, the fact remains that he does not personally inspect every derelict caught up in the elimination process, and when he makes a personal appearance the prisoner is more than a routine suspect.

(Question No. 2)

Burden is on State to establish when adversary proceedings began.

Defendant contends that substantive constitutional rights cannot be lost by virtue of procedural rules unless such procedure be reasonable. The record below was silent as to whether the out-of-court confrontation, held on the same day as issuance of the Warrant of Arrest, preceded the warrant or not. The North Carolina court placed the burden of showing that confrontation followed issuance of warrant on the prisoner. Since issuance of a warrant may precede its service by weeks, months, or years, the time of issuance is a matter always and easily within the knowledge of the State and not assuredly in the knowledge of the prisoner. Consequently, the North Carolina Supreme Court did not hold that the burden is automatically on the prisoner. It held that the burden of going forward shifts to the prisoner when it appears that the confrontation was the first one -- held that there is a presumption that the police would never issue a warrant without at least one identification and that consequently the first confrontation is presumed to precede the warrant.

Since time of issuance of the warrant is a routine matter of documentary evidence, a matter of record, with the records in the control of the State, it is not reasonable to leave such matters in the realm of testimony with shifting burdens of going forward with the evidence, etc. Further, even if the presumption be valid as a general proposition, the presumption here was dissipated by the fact that the District Attorney was present. There is an equal presumption that the District Attorney does not take part in police investigations until there has been at least one identification obtained.

(Question No. 3)

The Show-up was constitutionally defective because there was no showing of necessity for dispensing with a line-up.

The Supreme Court of North Carolina conceded that ordinarily, when a defendant is in custody, and the identifying witness has roots in the community, it is not permissible to exhibit the prisoner singly. But the Supreme Court of North Carolina also felt that it could very well be that if the single confrontation be held within a very short time after the offense, while recollection was fresh, a show-up would not be subject to attack. Even so, however, the court below said the question was a close one and left it undecided because of the way it decided Question No. 4.

Since the ruling below poses the possibility of the operation of a rule of law permitting a show-up instead of a line-up if held within a "short time and as soon as feasible after the offense", and since such a rule would have not inconsiderable consequences upon police practices, defendant feels that the question should be authoritatively answered the first suitable time. And defendant feels that this case is a suitable vehicle.

(Question No. 4)

The Clear and Convincing Evidence Rule applies to State cases.

Immediately after UNITED STATES V. WADE, the Supreme Court of North Carolina, in a series of opinions paid service by dicta to the "clear and convincing evidence" rule:

STATE V. WILLIAMS, 163 SE2d 353 at 362 [4]
STATE V. AUSTIN, 172 SE2d 507 at 511
STATE V. MCVAY, 177 SE2d 874 at 877
STATE V. MORRIS, 183 SE2d 634 at 637
STATE V. MCVAY, 183 SE2d 652 at 655
STATE V. CHANCE, 185 SE2d 227 at 237

However, commencing with STATE V. BASS, 186 SE2d 384 at 391 and then in STATE V. TUGGLE, 201 SE2d 884, and finally in this case, we hear nothing more about "clear and convincing evidence." Thenceforth, it is "competent" evidence, not "clear and convincing evidence", which is binding on appellate courts. Nor is this change an inadvertant one with the attention of the court not focused on the distinction. The defendant in his brief and oral argument expressly invoked the "clear and convincing evidence" rule, and the Supreme Court of North Carolina in response made it a point to lay down for the bar and the bench a formal statement of the law applicable -- a statement in which "clear and convincing" is prominent by its absence, and in which "competent" is predominant by its presence.

It seems that at the time of STATE V. BASS (1972) the Supreme Court of North Carolina was of the opinion that this Court was less than happy about its restrictions on out-of-court identifications; that a retrenchment was in the offing; and that the "clear and convincing evidence" rule, stated in a federal and not a state case, was an apt instrumentality for shading, if not emasculating, the prohibitions against single exhibitions and the requirements of right to counsel. That is, this sudden switch was not inadvertent but was in hopes that the prayer

in STATE V. WILLIAMS, 163 SE2d 353 for a new day was about to be answered:

> "be that as it may, the decision of the United States Supreme Court, however erroneous we believe it to be, is binding upon us as an authoritative construction of the United States Constitution. Though we look hopefully for the dawn of a new day, we must, therefore, decide the present case as if we, ourselves, fully concurred..." (p. 361) (italics added).

Defendant is at a loss for a tactful way in which to assess the differences between this Court and that of the Supreme Court of North Carolina, and will, therefore, content himself with suggesting that, no matter the ultimate result, a speedy resolution will serve the public interest. The question is purely one of law, and litigation in the lower federal courts under habeas corpus will not serve to improve clarity, or further define the issues.

If the present restrictions on out-of-court identifications are to remain, the "clear and convincing" rule will have to be enforced. The whole thing now is a ritual. The witness is asked if she bases her testimony on what she saw at the time; she says "yes"; the trial Court so finds; the Appellate Court says such testimony is "competent", lip service has been paid to the Constitution; and everybody is happy except the prisoner.

(Question No. 5)

The Evidence was not clear and convincing and does not demonstrate reliability under the totality of the circumstances.

When evidence for the State shows that the witness was questioned at a time before the show-up when the police did not know the identity of her attacker and nevertheless she left no description of him in their possession; and the evidence further shows that, because of a wish to be sure, she hesitated for "five minutes" before assenting to the person personally tendered her by the District Attorney, it is impossible to make a valid finding that the two identifications can be dissassociated and impossible to hold that the identification is reliable under all the circumstances.

If the witness had stated in open court that she was unsure, and had studied the defendant for "five minutes" before identifying him, no jury would have convicted.

(Question No. 6)

Death for Burglary and Non-injurious Rape is a cruel and unusual punishment per se.

Since this ever-recurring question must eventually be answered, and since the two capital cases here are deemed more venial than other capital crimes, defendant hopes that the Court will feel the best procedure is to attack the problem piecemeal from the lesser to the greater, and that now is the proper time to start.

(Question No. 7)

FURMAN V. GEORGIA did not strike the discretionary proviso and leave the mandatory death sentence intact.

The decision below was predicated upon STATE V. WADDELL 194 SE2d 19 and STATE V. JARRETTE, 202 SE2d 721. And WADDELL, especially the concurring opinion therein of Mr. Justice Higgins, demonstrates clearly that the differences between the majority and minority of the Court stem directly and inevitably from differing interpretations concerning what FURMAN V. GEORGIA requires.

The majority syllogism is as follows:

1. FURMAN V. GEORGIA strikes, not the death sentence provision of the Act of 1868, but the jury discretion proviso of the Act of 1949.
2. Under local law, with the proviso gone, the original statute which makes death mandatory remains inviolate.
3. Consequently, death is now mandatory.

The syllogism of the minority is as follows:

1. FURMAN V. GEORGIA strikes, not the proviso of the act of 1949, but the mandatory death provision of the Act of 1868.

2. Under local law, abolition of death sentences does not absolve the culprit, but reduces his penalty to life imprisonment.

3. Consequently, life imprisonment is now the proper sentence.

In addition, the minority had a fall-back position. Even if FURMAN V. GEORGIA struck the proviso and not the death sentence, under local law death sentences cannot be used because the legislature intended otherwise in 1949 and to return to a death sentence would be to violate the last legislative intent.

The question of whether FURMAN V. GEORGIA strikes the death sentence or the jury discretion proviso is not a matter of semantics. It is a real, life-and-death question. Mr. Justice Lake indicated that he joined the majority because he was of the opinion that FURMAN V. GEORGIA outlawed jury discretion in any kind of case, not merely capital cases, and consequently it was the discretionary proviso which had to fall. (STATE V. JARRETTE, 202 SE2d 721 at 743). If it be the law that FURMAN V. GEORGIA would not prevent juries having unbridled discretion to reduce a life imprisonment sentence to a term of years, it is quite probable that Mr. Justice Lake would join the minority in WADDELL and thereby change the complexion of North Carolina's death row.

(Questions Nos. 8 and 9)

Prosecutorial discretion without judicial supervision prevents use of death penalty.

Defendant reads FURMAN V. GEORGIA as holding that the exercise of discretion as to death (even though exercised in the open and thus subject to a need to justify the decision to one friends and the public), prevents the imposition of a death sentence if the history of the past discloses that there

has been no real correspondence between the incidence of death and the difficulties of proof.

Material the subject of judicial notice shows that in North Carolina for every one person tried for his life because of Rape, many, many are relieved of that anguish. Rape is not a hard case to try in North Carolina: corroboration is not required, the case can be submitted to the jury on the testimony of the victim solely; a sense of chivalry makes the jury reluctant to brand any girl not a slut a willing participant, and the defense of consent is consequently quite often not available in this State. Obviously then, it is not par for the course for only one of every fifty-five to result in a capital trial. And the discretionary decisions bringing about such disparity are all made within the realm belonging to the prosecution.

Defendant believes that FURMAN V. GEORGIA did not intend to sanction the anomaly of forbidding overt discretion by the jury in the view of all, but permitting the covert variety by the District Attorney known to nobody except the defendant, the victim, and law enforcement officers.

Defendant does not contend that the consequences must be abolition of death sentences for rape. He contends that the consequence must be a suspension of such sentences until a procedure is adopted whereby, in open court, a decision can be made predicated upon problems of proof.

Mandatory supervision of all decisions not to seek the death penalty would not require extended hearing of evidence, nor uncritical acceptance of the District Attorney's doubts of conviction. In every capital case doubts of conviction are always predicated upon objective facts which can be established without taking long testimony. For example, in rape cases, aside from instances where the victim refuses to testify, or has made prior inconsistent statements, one or more of the following objective elements always exist in cases where a conviction is not obtained before the jury:

1. There was no outcry.

2. There was long delay in reporting.

3. Accusation was preceded by unwanted discovery by others of embarrasing sexual intercourse.

4. There was no injury to the genital area and no deadly weapon.

5. The victim and defendant had had prior social relationships.

6. There was an iron-clad alibi.

7. The victim had a history of promiscuous sexual intercourse.

(Question No. 10)

ASHTON V. KENTUCKY relieves the defendant of the burden of showing racial, religious, or class discrimination and places the burden of showing its absence on the Legislature.

The defendant has no specific case by case comparisons showing that persons in his class, indigents, have been discriminated against in Rape cases. He argues, supra, that public record statistics show that the choice between those to die and those to live is predicated upon matters of one kind or another which are not related to difficulties of proof -- that is, many persons are bound to have been favored upon criteria extraneous to the law and the evidence. He still contends that such a showing is sufficient under FURMAN V. GEORGIA.

He here contends that if the Constitution nevertheless requires that there be an actual determination of discrimination based on color, class, religion, etc. then ASHTON V. KENTUCKY, 384 US 195, requires that the burden fall on the Legislature. Neither the defendant, the Supreme Court of North Carolina, nor this Court, is in a position to make such an investigation. But the Legislature is. FURMAN V. GEORGIA, in conjunction with ASHTON V. KENTUCKY, 384 US 195, requires every legislature to review its practices and inform the public whether the practices are now such as to validate death sentences. If that is

not done, by re-enactment of death statutes, or otherwise, the death sentence must be suspended in every state in default.

(Question No. 11)

A verdict by a jury ignorant that death was its necessary consequence violates the Due Process Clause of the 14th Amendment and the jury trial provision of the Sixth Amendment.

Although jurors have a healthy scepticism concerning statements by lawyers, the constant reference to death penalty during voir dire, the unobjected to pleas by defense counsel for the life of his client, made it highly likely that the jury below knew that death was possible. But they did not know that death was mandatory. They were just as much interested in whether the Judge could grant clemency as in whether they could. And since it was inconceivable to them that the fact would be concealed if death were mandatory, the instruction of the Court that the matter was a concern of his, not theirs, informed them that a guilty verdict would not hang a death on their conscience; that the proximate cause of any death would be the trial Court.

It was impossible for a juror not to know that death was the necessary result of his verdict at common law. A capital trial was more than a case in court; it was a public ceremony -- a pageant, as it were -- with death as the central theme. During arraignment the prisoner was solemnly advised to invoke the Deity to preside over his jury; to ask that he be tried by his God and his Country. And every juror was made to undergo a "purification" ceremony of his own. Seated alone on a dais he was cynosure of all eyes while being probed by counsel; and in the event he tended to forget that he would be killing a living spirit he was required to undergo an eyeball to eyeball confrontation with the prisoner, to look the prisoner squarely in the eye and carry the

indelible image thenceforth with him into the box. Much was lost when North Carolina abandoned the practice and began selecting capital case juries in the same way as trespass cases.

This ceremony, like all ceremonies, was designed to fill a human need; to assure the public that the government was also in awe of the great mystery of life, and well knew that a death trial should be a thing apart from other criminal cases. In all ages the philosophy that voluntarily taking life under any circumstances is an assault against the meaning of existence and forbidden by God has been widespread. And no less today. To trick a juror into a sin felt by him to be mortal was unthinkable.

With more than due respect for the Supreme Court of North Carolina, counsel feels that the Court's objective is a will-of-the-wisp. Obviously, absent action by this Court, or the Legislature, it will soon again become a matter of public knowledge in North Carolina that death is mandatory; and any scheme to hide it from the jury will eventually be a futile one. Further, the interim result will be that convictions will depend in part upon how knowledgeable the jurors are about the law. In fact, in STATE V. BRITT (May 1974) the Supreme Court of North Carolina held that if it appears the jury is uncertain concerning the effect of their verdict they should be instructed. (BRITT is the subject of a separate Motion in this cause in this Court). Thus, in North Carolina a verdict by an ignorant jury can stand, but a verdict by an uncertain jury cannot. Surely, the Due Process Clause does not permit the State to impose death sentences by lottery.

How easy it is now to kill in North Carolina. The trial judge's conscience is clear because the law gives him no alternative, and the same is true of the executioner. The jury has no qualms because they are not permitted to know what is at stake except in cases where their ignorance "shows". (See Question No. 12) The Appellate Courts of North Carolina

need no consolation because death is made mandatory, not by them, but by the Supreme Court of the United States. (See Question No. 7).

(Question No. 12)

FURMAN V. GEORGIA does not forbid the jury being told that death is a necessary consequence of their verdict.

The Attorney General laid it squarely on the line. He told the Supreme Court of North Carolina that if the jury were permitted to know the consequences of their verdict, the possible resultant exercise of jury discretion would cause the law to revert to pre-WADDELL (meaning pre-FURMAN) days, (State Brief p. 33). Since the Attorney General is charged with protecting the integrity of North Carolina's laws from federal attack, he was telling the Court that to inform the jury of the consequences might result in conviction statistics of an unpleasant pattern, and that the death penalty in North Carolina might thereby again run the risk of federal abolition.

The Supreme Court of North Carolina adopted his remedy. But the opinion in the instant case did not make clear whether they adopted his rationale; whether they acted under the compulsion of their view of FURMAN V. GEORGIA, or whether the decision was one of State law solely.

However, in STATE V. BRITT (May 1974) the North Carolina made it clear that the remedy flowed from FURMAN compulsion:

> "It is apparent that the decision of the United States Supreme Court in Furman v. Georgia, 408 US 238, 33 Led 2d 346, 92 S. Ct. 2726, and our interpretations of the effects of the Furman decision as related to punishment in capital cases have created some uncertainty among lawyers, the judiciary, and the general public, the source of the triers of fact in most litigation." (STATE V. BRITT, slip opinion, p. 11)

BRITT attempted to reconcile what was felt to be conflicting requirements of the U. S. Supreme Court. First, a requirement of FURMAN forbidding the court to commit or permit any act which facilitates jury discretion which serves to save life. Second, the requirement of WITHERSPOON that counsel has a right to probe the jury concerning religious scruples.

Because of the past history of jury clemency in North Carolina, the action of the trial jury in the BRITT case made it manifest to the Supreme Court of North Carolina that a refusal of the trial Court to discuss the question of clemency could very well leave the impression that it was available -- it being unthinkable that the Court would not say so if death were mandatory. However, feeling constrained by FURMAN the Supreme Court of North Carolina refused to either require or permit the trial judge to talk about the consequences of a guilty verdict unless the jury of its volition demonstrated uncertainty.

The Supreme Court of North Carolina laid down the following rules in BRITT:

1. Counsel for both sides can probe for religious scruples of jurymen.

2. Counsel for defendant can tell the jury that death is mandatory. (This would not be State action), and might dispel uncertainty.

3. Except as provided below, the Court cannot tell the jury that death is mandatory for this would be State action.

4. However, if the jury of its own volition makes it apparent that they are uncertain as to the law then it is the duty of the Court to tell them that death is mandatory. This violation of FURMAN is proper because it is a necessity thrust upon the Court, and is not of the Court's own seeking.

Obviously, unless FURMAN forbids, the above state of affairs should be quickly ended and the Court permitted to tell the jury the truth. And if FURMAN does not forbid, a statement to that effect from this Court would save no little amount of future litigation and could reduce the largest death row in the country to normal size.

(Question No. 13)

Disparate treatment of alibi defendants concerning corpus delicti violates the Due Process and Equal Protection of the Laws Provisions of U. S. Constitution.

Defendant contended below that the testimony of the witness that she submitted to the defendant unqualified by any statement that she did so from fear of great bodily harm, made it a jury question as to whether or not defendant was guilty of a lesser offense. Further, defendant contended that testimony of witness that she locked all the doors coupled with her testimony she noticed no signs of force having been applied to the doors or locks, and coupled with absence of evidence from the police that such force had been applied, made it a jury question as to whether or not one or more doors had been left open and whether or not the burglary was less than capital.

The Supreme Court of North Carolina disposed of both contentions with the following language:

> "Here, all the evidence shows a completed act of intercourse. Defendant's defense was alibi. There was no evidence to support either of the lesser included offenses." (p. 25) (italics added)

> "Defendant, without assignment of error, argues in his Brief that the lesser included offenses of burglary should have been submitted to the jury. This argument must fall by virtue of the same authorities and reasoning upon which we overruled Assignments of Error 32 and 33." (p. 25)

> "The record reveals no testimony which indicates any door of the mobile home was open at the time the defendant entered the trailer. Rather, the uncontradicted evidence is that all three doors were locked prior to defendant's entry." (p. 24)

Since the Supreme Court had held in STATE V. MADDEN, 192 SE 859 that testimony of locked doors coupled with testimony of no force having been applied to the doors required dismissal of the prosecution and acquittal of prisoner, and since the only real difference between MADDEN and this case is that in MADDEN there was no claim of alibi, it would seem clear that the basis for the decision below is the alibi claim of Henderson:

> "If, as the State contends, the defendant made his entry through the back door, just how he did so without damaging the woodwork, breaking or springing the lock, or disturbing the key, which was on the inside of the lock is shrouded in mystery and a subject merely of conjecture." (STATE V. MADDEN, 192 SE 859)

Nor is this something new. There is an established line of cases in North Carolina which predicate refusal to permit defendant to attack deficiencies in proof of corpus delicti on the ground that defendant relies on alibi:

STATE V. JOHNSON, 154 SE2d 402
STATE V. SMITH, 160 SE2d 577
STATE V. LENTZ, 153 SE2d 864
STATE V. HOBBS, 32 SE2d 431
STATE V. MELTON, 189 SE2d 757

and in his Brief (p. 56) defendant sought to get around these cases by claiming the rule was not one of law even though the trial bench and bar regarded it as such. This contention was rejected and the Court in the opinion emphasised that "Defendant's defense was alibi."

Every crime is divided into two parts: (1) the crime itself (corpus delicti) and (2) the perpetrator of the crime. And from time immemorial all defenses are set up within that framework: showing (1) that no crime occurred, and showing (2) that the defendant was not the criminal if there were a crime.

Denying a defendant who relies on alibi theright to attack the deficiencies of proof of corpus delicti, and binding him by all testimony tending to show a crime while denying him the benefit of all testimony tending to show there was no crime, obviously puts alibi defendants in a different category from other defendants.

The justification seems to be that if he is found guilty his alibi testimony is false, he is therefore either a perjurer or suborner of perjury, and consequently forfeits the right to litigate matters which occurred at a place and time from which he claims to have been absent.

This justification has two flaws: (1) the jury could well be mistaken, and (2) punishment for perjury should be handled separately.

And it is especially onerous in rape cases. Every derelict knows that if he is charged with rape by a female of a social status greatly higher than his,

unless he can show regular prior social contact, to claim consent is to confess guilt. Unless the female be known to be such, a jury is reluctant to brand her a slut. Consequently, there is a great temptation on the part of "poor white trash" and blacks to insist to their lawyer that they were not present, that the police have the "wrong man".

(Question No. 14)

Failure to have made, and introduced in evidence, laboratory tests of blood and hair deprived Defendant of a fair trial within meaning of Due Process Clause of Fourteenth Amendment.

The prosecution had samples of blood either of the victim or of the attacker. They had access to defendant's blood. Laboratory comparison of the blood on the sheets with that of victim and defendant would have shown whether or not the blood on the sheets came from victim or defendant. If this blood came from neither, the defendant would have been innocent beyond cavil. The prospect of so showing lay solely in the power of the prosecution; not in the power of the defendant.

The prosecution removed two hairs from defendant's body and claimed their length and color showed they came from the victim. Microscopic comparison would have established this point beyond attack; and if in favor of the defendant would have made improper and irrelevant the argument that the hairs found on defendant belonged to the victim.

The Supreme Court of North Carolina held that failure to obtain such laboratory evidence was not within the purview of BRADY V. MARYLAND, 373 US 83 because (1) the State did not suppress evidence, it merely neglected to obtain evidence, (2) because the defendant neither at or prior to trial objected to such failure, and (3) the constitutional question is beyond

judicial review because there is no way of knowing what the tests would have revealed and no way that defendant can show he was prejudiced.

The gravamen of BRADY V. MARYLAND is lack of fair trial, and its thrust is not limited to suppressing evidence as distinguished from failing to obtain. Suppression, of course, shows bad faith. But bad faith is not required. Suppression also shows knowledge of a possible benefit to the defendant on part of the State; and that showing is required. However, such knowledge can be indicated in other ways. You don't need formal evidence to prove that contemporary science can differentiate between samples of hair and samples of blood; and you don't need legal authority to establish that the best interests of justice are not served by leaving matters in the realm of conjecture which can be made definite and certain in a simple manner.

Failure of defendant to object at the trial is not a waiver. The evidence was admissible at common law, and a feckless objection before the jury would have been prejudicial -- tantamount to a confession of identity between the samples. Motion to Suppress would not have been prejudicial but it would have been feckless. The complaint is not to introduction of incompetent evidence; the complaint is to failure to introduce complementary evidence.

Failure of defendant to move before trial for an Order of Court requiring such laboratory tests is not a waiver because defendant was without counsel at the time the hairs were found. Also, there is no clear statutory authority for such a motion, and no provision for paying the costs thereof. (See GS 7A-454).

Respectfully submitted,

W. R. Dalton, Jr.
Dalton & Long
604 N. C. National Bank Building
Burlington, N. C. 27215
Phone 919-228-7881

[redacted]

STATE of North Carolina

v.

Allen James HENDERSON.

No. 8.

Supreme Court of North Carolina.

March 13, 1974.

Defendant was convicted in the Superior Court, Alamance County, John Webb, Special Judge, of first-degree burglary [illegible]. The Supreme Court, Branch, J., held that in-court identification testimony by prosecuting witness following [illegible] identification procedure, and that imposition of death penalty did not constitute cruel and unusual punishment.

[illegible]

Justice [illegible] and Sharp, JJ., dissented in part and filed opinion.

1. Constitutional Law ⇐=268(8)

Counsel can thus explore unconstitutionally obtained is excluded from both [illegible] process is not a rule of evidence, but a matter of constitutional law.

2. Constitutional Law ⇐=268(10)

Test under due process clause as to pretrial identification procedures is whether or the totality of the circumstances reveal pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐=339, 641.2

Generally, an accused has a constitutional right to presence of counsel at an in-custody identification proceeding, and when counsel is not present, and where there is no voluntary waiver of counsel by accused, testimony of witnesses that they identified the accused at such confrontation must be excluded.

4. Criminal Law ⇐=339

In-court identification of accused by witness who took part in an illegal pretrial confrontation must be excluded unless it is first determined by trial judge on voir dire that the in-court identification is of independent origin and thus is not tainted by the illegal pretrial identification procedure.

5. Constitutional Law ⇐=268.1(7)

Criminal Law ⇐=641.2

A person's Sixth and Fourteenth Amendment right to counsel at pretrial identification procedures attaches only at or after the time that adversary judicial proceedings have been initiated against him. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law ⇐=641.3

Proceedings against defendant did not reach the critical stage which required presence of counsel for defendant where it was reasonable to infer that warrant was served on defendant after confrontation at sheriff's department and that, at the time of the confrontation, proceedings against defendant were investigatory rather than accusatory.

7. Constitutional Law ⇐=268(3)

The practice of showing suspects singly to persons for purposes of identification has been widely condemned, but whether such confrontation violates due process depends on the totality of the surrounding circumstances. U.S.C.A.Const. Amend. 14.

8. Criminal Law ⇐=339

Primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin.

9. Criminal Law ⇐=339

Factors to be considered in evaluating the likelihood of mistaken identification

ed at such confrontation must be

al Law ⊂=339

court identification of accused by who took part in an illegal pre- frontation must be excluded unless t determined by trial judge on voir t the in-court identification is of dent origin and thus is not tainted illegal pretrial identification proce-

al Law ⊂=339

Factors to be considered in evaluating likelihood of mistaken identification include the opportunity of the witness to view criminal at time of crime, degree of attention of the witness, accuracy of prior description of criminal by the witness, level of certainty demonstrated by witness at the confrontation, and length of time between the crime and the confrontation.

10. Criminal Law ⊂=339

Under the totality of the circumstances in prosecution for burglary and rape, in-court identification by victim of defendant was not tainted by pretrial confrontation which was allegedly illegal because it involved a single exhibition of defendant who was in custody under circumstances which could have easily permitted the formation of a lineup. U.S.C.A.Const. Amends. 6, 14.

11. Criminal Law ⊂=339(5)

While terms such as "I think," "my impression is" or "I believe" connote an indistinctiveness of perception or memory in a witness, they are not objectionable although they carry little weight.

12. Criminal Law ⊂=566

Identity is provable by circumstantial evidence in a criminal prosecution, even when there is a direct identification by a witness.

13. Criminal Law ⊂=1169.9

Admission of testimony of prosecutrix, in prosecution for rape and burglary, who stated that defendant asked her if she knew a family and that "I think the name was Wood", was not a prejudicial expression of opinion where defendant, on cross-examination, testified that he worked for a man named Woods.

14. Burglary ⊂=16

A "breaking" is an essential element of the offense of first-degree burglary. G.S. § 14-51.

15. Burglary ⊂=9(1)

There is a sufficient "breaking" to sustain a charge of first degree burglary when a person unlocks a door with a key, or opens a closed but not fastened window. G.S. § 14-51.

See publication Words and Phrases for other judicial constructions and definitions.

16. Burglary ⊂=9(1)

In order to show a breaking, in prosecution for burglary, it is not required that the State offer evidence of damage to a door or window. G.S. § 14-51.

17. Burglary ⊂=41(6)

Ample evidence existed, in prosecution for burglary and rape, from which jury could infer that there was a "breaking" within meaning of that term as used in reference to first-degree burglary, where, inter alia, prosecuting witness unequivocally testified that "before I laid down across the bed, I locked my doors." G.S. § 14-51.

18. Rape ⊂=1

"Rape" is carnal knowledge of a female by force and against her will.

See publication Words and Phrases for other judicial constructions and definitions.

19. Rape ⊂=6

The force necessary to constitute rape need not be actual physical force; fear, fright or coercion may take the place of the physical force.

20. Rape ⊂=11

Although consent is a perfect defense to a charge of rape, there is no legal consent when it is induced by violence or threat of violence.

21. Rape ⊂=57(1, 3)

Ample evidence existed in relation to both physical force and overpowering coercion and fear as to require jury in rape prosecution to determine whether or not defendant obtained carnal knowledge of prosecutrix forcibly and against her will.

22. Burglary ⊂⇒9

Entry of a dwelling or sleeping apartment is an essential element of the crime of burglary. G.S. § 14-51.

23. Criminal Law ⊂⇒822(1)

Trial judge's charge must be construed contextually as a whole, and when, so construed, it presents the law of the case in such manner as to leave no reasonable cause to believe that jury was misled or misinformed, an exception thereto will not be sustained.

24. Burglary ⊂⇒6(3)

Instruction of trial judge, in prosecution for burglary and rape, in which judge stated, inter alia, that State had to prove that the building was entered by the defendant "• • • coming into the mobile home and reaching into the bedroom would be an entering," was not sufficient to confuse the jurors or mislead them into believing that State did not need to prove the element of "breaking" in relation to burglary charge, where immediately after such statement the trial judge recited five additional elements of the crime that the State had to prove, in each of which trial judge specifically mentioned both the elements of breaking and entering. G.S. § 14-51.

25. Criminal Law ⊂⇒822(3)

Contextual reading of charge, in prosecution for burglary and rape, did not disclose that admittedly erroneous statements of trial judge, to effect that defendant's alibi was in the form of his own testimony, unduly highlighted the fact that only defendant's testimony supported the defense of alibi, or require a finding that trial judge thereby erroneously expressed an opinion concerning strength of defendant's defense.

26. Criminal Law ⊂⇒719

In criminal cases the general rule is that trial judge has the sole responsibility to render judgments upon jury verdicts within the limits prescribed by statute, and that the sole responsibility of the jury is to the determine the guilt or innocence of accused without being hindered by the quantum of punishment possible, probable or certain upon conviction.

27. Criminal Law ⊂⇒796

Trial judge properly refused, in prosecution for burglary and rape, to instruct jury as to the punishment which would result from conviction.

28. Criminal Law ⊂⇒1155(1)

Failure of officers to pursue particular investigative procedures relating to microscopic comparison of blood hair found on clothing of defendant, charged with burglary and rape, or to make laboratory comparison of defendant's blood and blood found on bed clothing belonging to prosecutrix, was not prejudicial error where there was strong evidence identifying defendant as the person who committed the crimes, and where record did not disclose that defense counsel sought to have such tests performed, that he requested the State to conduct such tests or that he sought to suppress evidence of the hair or the blood stains at trial.

29. Criminal Law ⊂⇒814(5)

Failure to instruct jury, in prosecution for rape and burglary, that if door were open the slightest degree the entering through such door would not be a "breaking", was not error where record revealed no testimony which indicated that any door of mobile home of victim was open at time defendant entered, but where, rather, the uncontroverted evidence was that all three doors were locked prior to defendant's entry. G.S. §§ 1-180, 14-51.

30. Burglary ⊂⇒6(3)

Criminal Law ⊂⇒1172.1(3)

Language of charge, in prosecution for burglary and rape, stating that a breaking "• • • simply means the opening or removal of anything blocking entrance, so

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Trial judge properly refused, in prosecution for burglary and rape, to instruct as to the punishment which would re-

riminal Law ⇐1172(3)

Failure of officers to observe particular legative procedures relating to questioning of defendant, charged with burglary and rape, or to make laboratory comparison of defendant's blood and blood on bed clothing belonging to prosecutrix, was not prejudicial error where there was strong evidence identifying defendant as the person who committed the crimes, and where record did not disclose defense counsel sought to have such performed, had he requested the State collect such tests, or that he sought to introduce evidence of the lack or the blood at trial.

riminal Law ⇐1169(1)

Failure to instruct jury, in prosecution for rape and burglary, that if defendant opened the shielded screen the entering might exist would not in a "breaking" was not error where record revealed testimony which indicated that any door which [illegible] was open at time defendant entered, but where, rather, the prosecuted evidence was that all three were locked prior to defendant's entry. G.S. §§ 1-180, 14-51.

urglary ⇐45(3)

riminal Law ⇐1172.1(3)

Language of charge, in prosecution for ary and rape, stating that a breaking * * * simply means the opening or val of anything blocking entrance, so the pushing open of a door that is latched would be a breaking.", would not be approved by Supreme Court, but reversal was not required where it did not appear that the jury was misled by such language. G.S. § 14-51.

31. Criminal Law ⇐795(1)

Necessity for instructing jury as to an included crime of lesser degree than the one charged arises only when there is evidence tending to support the included crime of lesser degree.

13. Rape ⇐59(9)

There was no evidence in rape prosecution to support either the lesser included offenses of assault with intent to commit rape or assault on a female where all evidence showed a completed act of intercourse, and where defendant's defense was alibi.

33. Rape ⇐55(18)

Charge on attempt to commit rape, as it related to charge of first-degree burglary, was adequate since, inter alia, record evidence showed that the intent was in fact, executed in connection with a brutal assault.

34. Criminal Law ⇐814(20)

Refusal to give instruction, in prosecution for burglary and rape, that if defendant entered the bedroom of prosecutrix without intent to use force, but only formed the intent to accomplish his purpose by force after she screamed, jury could return a verdict of guilty of the lesser included offense of nonburglarious breaking and entering, was proper where there was no evidence to support the instruction and where if such instruction, which was not requested by defendant's counsel, had been given it would have run counter to the sole defense of alibi.

35. Rape ⇐59(17)

Instruction on charge of rape, which advised the jury, inter alia, that it would be their duty to return a verdict of guilty if they found from the evidence beyond a reasonable doubt that defendant, by use of force or threat of force, had sexual intercourse with prosecutrix without her consent and against her will, sufficiently described the required degree of resistance.

36. Criminal Law ⇐841

Generally, objections to charge relating to the stating of the contentions of parties, or to misapprehending the evidence, must be called to court's attention in time to afford opportunity for correction, but such rule does not apply where contentions were given by the judge which were based on unintroduced evidence, which erroneously recited defendant's testimony, or which misstated the burden of proof to defendant's prejudice.

37. Criminal Law ⇐1172.1(2)

Failure of trial judge, in prosecution for rape and burglary, to include in his charge certain evidence which defense counsel elicited on cross-examination, did not require reversal where, inter alia, question of whether victim recognized color of her assailant's shirt, noticed the damage to her locks, or made an inconsistent statement concerning being knocked off the bed by her assailant, did not appear to be of crucial importance to defendant's defense, and where contextual reading of entire charge failed to show that the charge was weighted in favor of the State or that omission of the matters complained of amounted to an expression of opinion of trial judge in violation of statute. G.S. § 1-180.

38. Constitutional Law ⇐270

Criminal Law ⇐1213

Death sentence imposed upon defendant, who was convicted of burglary and rape, did not constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. U.S.C.A.Const. Amends. 8, 14.

Prior to his trial, defendant was represented by Mr. Wiley P. Wooten, who was appointed by the court on 20 June 1973. Thereafter defendant employed Mr. Fred Darlington, III, of the Alamance County Bar to represent him on these charges, and by Order dated 9 August 1973 Mr. Wooten was relieved of further responsibilities as court-appointed counsel. Prior to his discharge, Mr. Wooten had obtained an Order committing defendant to Cherry Hospital for sixty days for observation and determination of his competency to stand trial upon the pending charges. The Court was furnished with the appropriate certificate and disclosure statement signed by Dr. Eugene V. Maynard, of the Cherry Hospital Staff, which stated that examination, observation and testing performed at Cherry Hospital revealed no evidence of insanity or any comparable mental disorder which might interfere with defendant's competency to stand trial upon the charges of first degree burglary and rape.

Upon his arraignment defendant entered a plea of not guilty to both charges.

The State's evidence, in substance, discloses the following:

Judith Ann Strader testified that she was employed as a teacher by the Burlington City School system. On the night of 18 June 1973, she returned to her mobile home in Terrywood Mobile Home Park at about 9:30 p. m. after attending a ceramics class in Burlington. She lived in a 65 foot mobile home which contained two bedrooms, a living room, dining room and kitchen. The master bedroom is at one end of the mobile home and the kitchen is at the other end. The living room is located between the kitchen and master bedroom and the front door of the mobile home enters into the living room. There is a back door to the kitchen and a back door entering the hall next to the bathroom serving the master bedroom. After visiting a neighbor, she locked the doors of the mobile home, undressed and put on a robe. She lay down on her bed in the master bedroom between 10:30 and 10:45 p. m. and dropped off to sleep. She had planned to get up and straighten the kitchen and had therefore left the lights on in the living room. There were three Duke Power night lights located near her trailer. One light was near the front of the mobile home, one was near the rear of the trailer and one light was across the street so that it shone almost directly into her bedroom window. The moon was about half full on this night. She was awakened by the barking of her Pekinese dog, and when she sat up in the bed, she saw a man standing in the doorway of her bedroom.

At this point the Solicitor asked if the first she saw on that night was in the courtroom. Defendant's counsel objected and asked to be heard. After a voir dire hearing, the trial judge overruled defendant's objection and motion to suppress. (We will hereafter more fully discuss the voir dire hearing and the resulting ruling by the trial judge.)

The jury returned to the courtroom and Judith Ann Strader identified defendant as her assailant. She further testified:

"When I was aroused by my dog, I saw the man standing in the doorway of my bedroom and I raised up on my arms and looked and first I felt shocked and then he lunged at me. I was struggling to get away, and I screamed two or three times. I am not sure, and I screamed and when I did he hit me with his fist in my face and bruised my upper face and forehead, my eyes, the side of my face and my lip and I kept struggling the best that I knew how to get away and at this time he started choking me. He didn't say anything at all at that time. He choked me almost to the point I felt all the air and everything going out of my body, and he pushed me up in the bed and at this time he did rape me, keeping one hand at my neck part of the time and my body was pinned down. My body was pinned down. The defendant's private parts entered my private

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parts. I didn't give consent for him to have intercourse with me. I didn't give the defendant or any other person consent or permission to come into my mobile home that night. . . . ."

Miss Strader further stated that defendant remained in her trailer for nearly an hour, and upon the pretext of quieting her barking dog she managed to escape and flee to a nearby trailer occupied by Mr. and Mrs. Don Hall. The Hails summoned law

[illegible] and [illegible] the police arrived. [illegible] then she was carried to the hospital.

Mrs. Elizabeth Hall testified that in the early morning hours of 19 June 1973, Judith Strader came to her mobile home in a hysterical condition. Miss Strader told her that there was a man in her trailer and that he had raped her. Mrs. Hall said that at that time she looked out the window and saw a large colored male leaving the victim's trailer with a dent to the side and back window. The automobile was being operated in a manner [illegible] Mrs. Hall testified that there was a knot and a bruise over Judith Strader's right eye, a bruise on her left eye, red marks on her throat and that her lip was swollen.

Mr. James Little of the Alamance County Sheriff's Department testified that in response to a call he went to Judith Ann Strader's mobile home. He said the person there was Mr. Don Hall. He noted the bedroom "torn up", the bedspread on the floor and blood on the sheets and pillow case. He talked to Miss Strader at about 1:30 a. m. on 19 June 1973. The statement made to him by Miss Strader was admitted into evidence under a proper limiting instruction.

Mr. James Andrews of the Alamance County Sheriff's Department testified that as a result of a call, he stopped defendant at about 1:30 a. m. on 19 June 1973 on Highway 49 near Haw River. Defendant was operating a 1964 light colored Chevelle with a damaged back fender. At his request, defendant accompanied him to the Alamance County Sheriff's Department where Officer Talbert advised defendant of his Constitutional rights.

Mr. Kenneth Talbert of the Alamance County Sheriff's Department stated that he talked with defendant during the early morning hours of 19 June 1973. After advising defendant of his rights he began to question him, but defendant said that he did not wish to answer any questions until he had contacted an attorney. However [illegible] agreed to the removal of his clothing, and Mr. Talbert found two head hairs about 12 to 18 inches in length on defendant's clothes.

The State rested and defendant's motions as of nonsuit as to both charges were denied.

Defendant, testifying in his own behalf, stated that he lived with his wife and two children in a mobile home in Terrywood Park. His daughter had sandy blond hair. He had seen Judith Strader, who was acquainted with his wife, around the trailer park. On 18 June 1973 he worked until about 4:30 p. m. for Alcar Tree Company. On that day he wore a hooded work shirt, trousers and lace-up boots. Upon leaving work, he went to his mother's home in Graham for a short visit, then to the ABC store in Graham where he purchased a pint of vodka. He then went to Dean Bonding Company where he had a drink, then to Mebane where he drank two beers, then into Caswell County where he took another drink of vodka then returned to Mebane where he drank three beers, then to Hillsborough where he had two beers. He started to Burlington on Highway I-85, and he was stopped at about 8:30 p. m. and cited for speeding 80 mph in a 65 mph zone. From there he proceeded to Gus' Drive In on Highway 54 between Burlington and Graham where he drank more beer. He then went to a cafe for more beer. He left the cafe at about 11:00 p. m. and returned to Gus' Drive In where he remained until about midnight. He returned to Highway I-85 and left that highway at

the Haw River Exit where he stopped and called his wife from a telephone booth. After talking to her for 15 to 25 minutes, he proceeded through and beyond Haw River, North Carolina, on Highway 49 where he was stopped by a police officer. He did not go back to Terrywood Mobile Home Park after he left there at about 6:00 a. m. on the morning of the 18th. The scratches on his arms were caused by his tree cutting work. He had been convicted of assault with attempt to commit rape in 1969. He could not remember the number of assault charges for which he had been convicted.

Upon completion of defendant's testimony, both the state and defendant rested.

The jury returned verdicts of guilty of first degree burglary and rape.

The trial judge pronounced judgment sentencing [illegible] Henderson to death by asphyxiation.

Atty. Gen. Robert Morgan and Associate Attorney Richard L. Griffin, Raleigh, for the State.

W. R. Dalton, Jr. and Fred Darlington, III, Burlington, for defendant-appellant.

David E. Kendall, New York City, for the NAACP Legal Defense Fund.

BRANCH, Justice.

Defendant assigns as error the admission, over his objection, of the in-court identification testimony by the prosecuting witness, Judith Strader. He argues that this testimony was tainted by an out-of-court identification procedure which violated Constitutional rights guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution in that the identification procedure was conducted in the absence of counsel and was impermissibly suggestive and conducive to mistaken identification.

Since the State did not offer evidence in presence of the jury concerning identification of the accused at a lineup or a show up, we are only concerned with the admissibility of the in-court identification testimony.

[1, 2] Since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the general rule has been that evidence unconstitutionally obtained is excluded in both State and Federal Courts as essential to due process—not as a rule of evidence but as a matter of Constitutional law. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345; State v. Colson, 274 N.C. 295, 163 S.E.2d 376. The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances render pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402; Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183; State v. Hoskins, 277 N.C. 52, 176 S.E.2d 600; State v. Austin, 276 N.C. 291, 172 S.E.2d 507; State v. Rogers, *supra*.

These due process requirements have been enlarged by case holdings requiring presence of counsel at lineups or showups. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178; Stovall v. Denno, *supra*. The broad principles set forth in *Wade*, *Gilbert* and *Stovall* resulted in many diverse interpretations by other appellate courts. One of the questions causing conflict in the appellate courts was at what stage of the proceedings the rule requiring presence of counsel became operative.

[3, 4] Our Court has generally held that an accused has a Constitutional right to presence of counsel at an in-custody identification proceeding, and when counsel is not present and there is no voluntary waiver of counsel by the accused, testimony of witnesses that they identified the accused

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N.C. 201, 162 S.E.2d 218 [illegible]

such confrontation must be excluded. Furthermore, an in-court identification of the accused by a witness who took part in such pretrial confrontation must be excluded unless it is first determined by the trial judge on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *United States v. Wade*, *supra*; *Gilbert v. California*, *supra*; *State v. Bass*, 281 N.C. 435, 189 S.E.2d 384; *State v. Smith*, 278 N.C. 476, 180 S.E.2d 7; *State v. Worthy*, *supra*; *Foley v. Rogers*, *supra*.

[3] The recent case of *Foley v. Rogers*, [illegible] 203 S.E.2d 49 (1973), which defendant cites and relies upon, considerably moves the stage at which the right to counsel attaches in pretrial identification procedures. In that case, the United States Supreme Court held that a person's Sixth and Fourteenth Amendment right to counsel in pretrial identification procedures attaches only "at or after the time that adversary judicial proceedings have been initiated against him." *See also State v. Morris*, 281 N.C. 698, 190 S.E.2d 164. Although our Court's rather broad [illegible] appear to be at odds with the holding in *Kirby*, Confrontation or the Court of Appeals of Kirby Court's interpretation of the right to counsel at pretrial confrontation procedures has often comported with the rationale of the holding in *Kirby*. [illegible] Where such confrontations for investigatory steps of proceedings were not in the critical stage, requiring presence of counsel. *State v. Mems*, *supra*; *State v. McNeil*, 277 N.C. 162, 176 S.E.2d 775. In *State v. Wright*, 274 N.C. 84, 161 S.E.2d 581 this Court held that defendant's right to counsel in a pretrial identification procedure was not violated until the proceeding [illegible] lost its character as a pretrial investigative procedure and became a "critical" stage [illegible] requiring the presence of counsel. Even so, the holding in *Kirby* considerably narrows our interpretation as to when the right to counsel attaches in pretrial identification proceedings.

It is not argued that defendant was an indigent and subject to the provisions of Article 36 of Chapter 7A of the General Statutes. However, we note that the General Assembly amended G.S. § 7A-451(b)(2), effective 10 April 1973, to require counsel for indigents at pretrial identification proceedings *only after formal charges have been preferred* and at which the presence of the indigent was required. This amendment apparently stems from the holding in *Kirby*.

[4] Here, the alleged rape occurred after midnight on 19 June 1973. Judith Strader reported at a nearby neighbor's home and police officers arrived. She was questioned by them, and thereafter she was taken to the hospital for examination and treatment. The record does not disclose at what time the return to the hospital. Defendant was taken to the sheriff's Department at about 2:30 a.m. on the morning of 19 June 1973. The confrontation between Judith Strader and defendant occurred at the Sheriff's Department at about 10:00 a.m. on the same day. The record does not indicate that any adversary judicial criminal proceedings had been initiated against defendant prior to the confrontation. The record does show that a warrant was served on defendant on the same day. There had been no previous identification of defendant. It is therefore reasonable to infer that the warrant was served after the confrontation at the Sheriff's Department and that at the time of the confrontation the proceeding was investigatory rather than accusatory. Thus the proceeding had not reached the critical stage which required the presence of counsel for defendant.

Defendant further contends that the confrontation offended fundamental standards of decency, fairness and justice so as to deny him his Constitutional right of due process.

[7] The practice of showing suspects singly to persons for purposes of identification has been widely condemned. Stovall

v. Denno, *supra*; State v. Wright, *supra*. However, whether such a confrontation violates due process depends on the totality of the surrounding circumstances. Stovall v. Denno, *supra*.

We recognize that there are circumstances under which the single exhibition of a suspect may be proper. The landmark case of Stovall v. Denno, *supra*, held that the showing of a single suspect in a hospital room while he was handcuffed to police officers did not violate due process because the [illegible] of the witness required an immediate confrontation. Our courts have held that there was no violation of due process when there were "unusual" courtroom and station house confrontations which amounted to single exhibitions of the accused. State v. Tuggle, 284 N.C. 518, 201 S.E.2d 844; State v. Rose, *supra*; State v. Hankins, *supra*; State v. Gaither, 278 N.C. 635, 180 S.E.2d 793. Similarly, we have recognized that a confrontation which takes place when a suspect is apprehended immediately after the commission of the crime may be proper. State v. McNeil, *supra*.

Whether an accused has been denied due process by a showup is a single inquiry and all of the accused requires an application of the recognized principles of law to the total circumstances. This often presents a difficult task.

Here, the fact that the single exhibition of defendant was held within a short time and as soon as feasible after the assault when the prosecuting witness had the opportunity to closely observe her assailant is counterbalanced by the fact that defendant was in custody under circumstances which would have easily permitted the formation of a lineup. However, the facts of this case do not require decision of this question. Even if we were to concede the confrontation to have been unconstitutionally suggestive and conducive to misidentification, and we do not, we are of the opinion that the in-court identification was properly admitted into evidence.

[8] It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; State v. Bass, *supra*; State v. Austin, *supra*; State v. Rogers, *supra*; State v. Wright, *supra*.

The recent case of Neil v. Biggers, [illegible] U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 [illegible] to federal cases. In [illegible] the defendant was arrested of rape. [illegible] evidence against him included [illegible] the prosecutrix at a pretrial police show[illegible] which consisted of two detectives walking the defendant past her.

In that case, the Court noted:

". . . . The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial (sic) light in her home and under a full moon outside, and at least twice, once in the house and later in the woods, faced him directly and intimately. . . . Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, . . . was more than adequate and thorough. She had 'no doubt' that respondent was the person who raped her. . . . She testified . . . that there was something about his eyes 'I don't think I could ever forget.'"

[9] In holding that the evidence was properly admitted and that the identification was reliable even though the confrontation procedure was suggestive, the Court set out certain factors to be considered in evaluating the likelihood of misidentification, including: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the

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[illegible] record [illegible] of Neil v. Biggers, 409 [illegible] defendant was convicted of rape. The [illegible] victim's testimony by [illegible] h consisted of two identical walking [illegible] defendant just [illegible]

[illegible] that [illegible] Court noted:

"[illegible] had ample opportunity to observe her assailant, up to [illegible] lf an hour. She was with him under adequate conditions [illegible] [illegible] [illegible]

of defendant was not tainted by the out-of-court confrontation and the trial judge correctly overruled defendant's objection and motion to suppress.

Defendant's seventh assignment of error is as follows:

"7. That his Honor erred in permitting the witness to state: 'He asked me if I knew a family I didn't know. I think the name was Wood', as shown by EXCEPTION NO. 8 (R p 25)."

The Solicitor asked the witness Linda Strader to tell what defendant did after she first saw him in the trailer. After testifying to the actual rape act, without further questioning, told of conversations occurring after the assault. While relating the conversation she, in part, testified:

". . . And then I said, 'Who are you?' He said, 'If I told you, then you would know who I was,' and he asked me my name. He asked me where I was from and I told him, and he asked if I knew a family I didn't know. I think the name was Wood.

MR. HARLINGTON: OBJECTION.

THE COURT: OVERRULED.

DEFENDANT'S EXCEPTION NO. 8"

Defendant seems to contend that the use of the words "I think" was a prejudicial expression of opinion.

[11] When terms such as "I think", "my impression is" or "I believe" connote an indistinctiveness of perception or memory, they are not objectionable although they may carry little weight. 1 Stansbury's North Carolina Evidence, § 122 (Brandis Revision 1973); McCormick, on Evidence, § 10 (1954 Ed.); State v. Haney, 263 N.C. 816, 140 S.E.2d 514.

Obviously, Miss Strader's use of the words "I think" indicated an unsure memory as to the family name.

[12] Defendant, on cross-examination, testified that he worked for a man named Woods. We think at this point the evidence became relevant and competent on the question of identity since identity is provable by circumstantial evidence even when there is a direct identification by a witness. State v. Perry, 275 N.C. 565, 169 S.E.2d 839.

The ground upon which defendant asserts his objection was not indicated by the question. However, defendant's counsel should have moved to strike the portion of the answer which he considered objectionable. 1 Stansbury's North Carolina Evidence, § 27 (Brandis Revision 1973); State v. Little, 228 N.C. 484, 391 S.E.2d 1. Counsel did not move to strike the aforequoted testimony or the subsequent evidence that defendant had worked for a man named Woods.

[13] It should be clearly understood that this assignment of error would not be decided adversely to defendant in this capital case because of the absence of motion to strike. Nevertheless, we think that the failure of defendant's able and experienced counsel to move that the testimony be stricken highlights his own characterization of the evidence as originally admitted as being innocuous and our conclusion that no prejudicial error resulted because of its admission.

This assignment of error is overruled.

Defendant contends that the trial judge erred in denying his motion for judgment as of nonsuit as to the charge of first degree burglary because there was no evidence of a "breaking".

[14, 15] Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. G.S. § 14-51; State v. Cox, 281 N.C. 131, 187 S.E.2d 785; State v. Allen, 279 N.C. 115, 181 S.E.2d 453. A "breaking" is an essential element of the offense of first degree burglary. State v. Knight,

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he ground upon which defendant as- objection was not believed by the

3] It should be clear that this assignment of error would not

361 N.C. 17, 134 S.E.2d 101; State v. McAfee, 247 N.C. 98, 100 S.E.2d 239; State v. Chambers, 218 N.C. 442, 11 S.E.2d 260. This Court has held that there is a sufficient "breaking" to sustain a charge of first degree burglary when a person unlocks a door with a key, State v. Knight, *supra*, or opens a closed, but not fastened window, State v. McAfee, *supra*.

Here defendant's counsel concedes that the opening of a closed door would be sufficient evidence of breaking. He argues,

the doors were closed.

the evidence must be considered in the light the benefit of every reasonable inference to be drawn therefrom, and nonsuit should direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. State v. Quick, 253 N.C. 369, 117 S.E.2d 1; State v. Vincent, 250 N.C. 43, 107 S.E.2d 516; State v. Nevin, 200 N.C. 129, 156 S.E. 134; 3 Strong's Index 3d, Criminal Law § 107.

In this case, the prosecuting witness unequivocally testified that when I had been across the bed, I noticed my shorts. There were three." And on cross-examination she testified "I knew my door were locked. As to my having a recollection of seeing each door, I have a photo[graph] those doors . . . . I can't tell if the locks has been tampered with."

[16] In order to show a breaking it is not required that the State offer evidence of damage to a door or window. State v. Tippett, 270 N.C. 568, 155 S.E.2d 269.

[17] Conceding that the State did not offer direct evidence that the locks on the doors had been tampered with or that force had been applied to the locks, we think that there was ample evidence from which the jury could reasonably infer that there was a "breaking" within the meaning of the term as used in reference to first degree burglary.

Defendant next contends that his motion for judgment as of nonsuit as to the charges of rape was erroneously denied because there was insufficient evidence to show that prosecuting witness continued to resist until the offense was consummated.

[18-20] Rape is the carnal knowledge of a female person by force and against her

S.E.2d 913; State v. Poore, 275 N.C. 141, 165 S.E.2d 225; State v. Crawford, 260 N.C. 133, 132 S.E.2d [illegible]. The force necessary to constitute rape need not be actual physical force. Fear, fright, or coercion may take the place of physical force. State v. Williams, 292 N.C. 77, 165 S.E.2d 353; State v. Primus, *supra*. Although consent is a perfect defense to a charge of rape, there is no legal consent when it is procured by violence or threat of violence. State v. Carter, 268 N.C. 626, 151 S.E.2d 876.

The prosecutrix witness testified:

"When I was aroused by my dog I saw the man standing in the doorway of my bedroom and I raised up on my arms and looked and then I felt [illegible] and then he lunged at me. I was struggling to get away, and I screamed two or three times, I am not sure, and I screamed and when I did he hit me with his fist in my face and bruised my upper neck and bruised my eyes, the side of my face and my lip and I kept struggling the best that I knew how to get away and at this time he started choking me. He didn't say anything at all at that time. He choked me almost to the point I felt all the air and everything going out of my body, and he pushed me up in the bed and at this time he did rape me, keeping one hand at my neck part of the time and my body was pinned down. My body was pinned down. The defendant's private parts entered my private parts. I didn't give consent for him to have intercourse with me. I

didn't give the defendant or any other person consent or permission to come into my mobile home that night. . . . I felt like if I did try to get away he was going to kill me."

Thereafter, the State, for the purpose of corroboration, offered into evidence a statement made by the prosecuting witness to Officer James Little. This statement reiterated the violent assault upon Miss Strader and concluded with these words:

". . . After I submitted he wasn't as rough. He must have been there at least thirty-five or forty minutes. He asked if he could come back again and I said not."

Defendant relies on the above-quoted statement to support this assignment of error.

The statement by the prosecuting witness that she "submitted" must be examined in light of all of the surrounding circumstances. Miss Strader was subjected to a violent beating. She was choked until she "felt all the air and everything going out of her body." She was then pushed onto the bed, pinned down and raped. She "was struggling to get away." Further, Miss Strader positively stated that she did not consent to have intercourse with defendant, and that even after the completion of the carnal act, she feared that he was going to kill her.

Certainly under these circumstances the prosecuting witness resisted to the extent of her abilities. We cannot imagine circumstances more conducive to such fear and coercion as would supplant physical force.

[21] There was ample evidence of both physical force and overpowering coercion and fear to require a jury determination as to whether defendant obtained carnal knowledge of Judith Strader "forcibly and against her will."

Defendant's Assignment of Error No. 20 is as follows:

"That his Honor erred in instructing the jury:

'the second thing the State must prove is that the building was entered by the defendant coming into the mobile home, and coming into the bedroom would be an entering.'"

Defendant apparently contends that the instruction complained of amounted to an expression of opinion by the trial judge that the State did not have to show that there was a "breaking".

[22] The entry of a dwelling or sleeping apartment is an essential element of the crime of burglary. State v. Cox, *supra*.

Immediately prior to the instruction complained of, the trial judge charged that the State *must* prove beyond a reasonable doubt seven things, the first being that:

". . . there was *a breaking* by the defendant. This simply means the opening or removal of anything blocking entrance, as the pushing open of a door that is latched would be a 'breaking.' If you are satisfied beyond a reasonable doubt that *there was a breaking* of Miss Strader's mobile home that night, the State would have satisfied you of the first thing *necessary* for you to convict the defendant on this charge." (Emphasis added)

Immediately after the instruction assigned as error, the trial judge recited two additional elements of the crime that the State must prove. In each of these charges the trial judge specifically mentioned both the elements of breaking and entering.

[23] It is a well-recognized rule of law that the trial judge's charge must be construed contextually as a whole, and when so construed, it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained. 7 N.C.Index 2d, Trial § 33.

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In the recent case of State v. Noell, N.C., 202 N.E.2d 750, Justice Moore, speaking for the Court stated:

"Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error. In People v. Baber, 31 Mich.App. 108, 187 N.W.2d 268 (1971), the failure of the police to check fingerprints in the room, to test a gun found at the scene of the crime for fingerprints, to check a broken window and screen for fibers of clothing, or otherwise take fingerprints in the house was held not to give rise to a valid claim of a constitutional denial of due process."

Since this assignment of error is related to the identification of defendant as the assailant, it must be borne in mind that there was no issue about a witness identifying defendant as the person who committed the crimes. Further, the record does not disclose that counsel made a request that tests be performed, that he requested the State to conduct these tests, or that he moved to suppress evidence of the blood hair or the blood stains at trial. Neither is there any indication that the officers or the prosecutor sought to suppress evidence favorable to defendant. In any event, defendant has failed to show prejudice since we have no way of knowing what the tests might have disclosed.

We find no prejudicial error in the failure of the officers to pursue these particular investigative procedures.

Defendant contends that the trial judge erred by failing to instruct the jury that if a door to the mobile home was open in the slightest degree, entering the trailer through that door would not be a breaking.

The trial judge in a criminal action is required to declare and explain the law arising on the evidence given in the case, and it is error to instruct on law which does not arise on the evidence. G.S. § 1-180; Wh... v. Cothran, 260 N.C. 510, 133 S.E.2d 132.

[29] The record reveals no testimon... which indicates that any door of the mobil... home was open at the time defendant entered the trailer. Rather the uncontroverted evidence is that all three doors were locked prior to defendant's entry. Therefore, it was not error for the trial judge to fail to instruct the jury that if the door were open... [illegible] entering [illegible] door would not be a breaking.

As part of this assignment of error, defendant argues that the trial judge erred by charging that a breaking "... simply means the opening or removal of anything blocking entrance, so the pushing open of a door that is latched would be breaking."

The trial judge in other portions of the charge correctly instructed on the law of breaking as related to first degree burglary and the uncontroverted evidence shows that all the doors were locked.

[30] Although we do not approve of the language used by the trial judge in the portion of the charge, we do not believe that the jury was misled by this single statement.

This assignment of error is overruled.

By Assignments of Error Numbers 32 and 33, defendant objects to the court's failure to submit to the jury the lesser included offenses of rape—assault with intent to commit rape and assault on a female.

[31] The necessity for instructing the jury as to an included crime of lesser degree than the one charged arises only when there is evidence to support the included crime of lesser degree. State v. Watson, 283 N.C. 383, 196 S.E.2d 212; State v. Bryant, 280 N.C. 551, 187 S.E.2d 111; State v. Carnes, 279 N.C. 549, 184 S.E.2d

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This assignment of error is overruled.

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[32] Here, all the evidence shows a completed act of intercourse. Defendant's defense was alibi. There was no evidence to support either of the lesser included offenses.

The trial judge did not err by failing to instruct the jury on the charge of as... ...ult [illegible] to commit rape or upon the ... of assault upon a female.

... fendant, without assignment of error, ... argues in his brief that the court should ... ...ff ... of breaking should have been sub... ...mitted to the jury. This argument must fail by virtue of the same authorities and reasons upon which we overruled Assignments of Error 32 and 33.

By Assignments of Error 26 and 27, defendant contends that the trial judge failed to correctly charge on intent to commit rape as it related to the charge of first degree burglary.

... first argues that the trial judge did not instruct the jury that defendant must have had an intent to rape, his position notwithstanding any resistance on the part of the prosecuting witness.

In that connection the trial judge, in part, charged:

"The sixth thing that the State must prove and prove beyond a reasonable doubt before you can convict the defendant of first degree burglary is that at the time of the breaking and entering, the defendant intended to commit rape.

If you are satisfied from the evidence and beyond a reasonable doubt that at the time the defendant broke and entered this mobile home that he intended to rape Miss Strader then the State would have satisfied you of the sixth thing necessary for you to convict the defendant of first degree burglary.

"Now, I charge you as to the rape. Rape is the forcible sexual intercourse with a female person against her will.

I charge you for you to find the defendant guilty of rape, the State must prove three things beyond a reasonable doubt.

First, that the defendant had sexual intercourse with Miss Strader.

Second, that the defendant used or threatened to use force sufficient to overcome any resistance that she might make, and

Third, the State must prove and prove beyond a reasonable doubt that Miss Strader did not consent to the sexual intercourse and it was against her will.

[33] We think under the circumstances of this case, that the charge on the "intent to commit rape" was adequate. This is particularly so since the record evidence shows that the intent was, in fact, executed in connection with a brutal assault.

[34] Defendant further argues that the judge should have instructed the jury that if defendant entered the prosecutrix's bedroom without intent to use force but only formed the intent to accomplish his purpose by force after she screamed, they could return a verdict of guilty of the lesser included offense of non-burglarious breaking and entering.

There was no evidence to support this instruction. State v. Watson, *supra*; State v. Bryant, *supra*; State v. Carnes, *supra*.

Further the instruction which defendant claims was erroneously omitted is in the nature of a contention. The instruction was not requested by defendant's counsel and if given, would have run counter to his sole defense of alibi.

These assignments of error are overruled.

Defendant also contends that the instructions on the charge of rape were erroneous in that they did not sufficiently describe the required degree of resistance and relate it to the facts of this case.

In the case of State v. Vicks, 223 N.C. 384, 26 S.E.2d 873, Judge Bone charged the jury as follows:

". . . if the State has, by evidence, satisfied the jury beyond a reasonable doubt that this defendant had carnal knowledge or sexual intercourse, the two terms being synonymous, with the prosecuting [illegible] by force and violence, and against her will, it would be your duty to return a verdict of guilty of rape, as charged in the bill of indictment, . . ."

Finding no error in the charge, this Court stated:

"When the whole charge is considered contextually, it is plain and leaves the jury no option to convict the defendant of rape if the evidence failed to satisfy them beyond a reasonable doubt of each of the essential elements of the offense. . . ."

In addition to the [illegible] noted in the preceding assignment of error, Judge Webb in his charge to the jury on the rape charge stated:

"I charge you if you find from the evidence and beyond a reasonable doubt that on or about June 18, 1973, the defendant Alton James Henderson by the use of force or threat of force had sexual intercourse with Judy Ann Strader without her consent and against her will, it would be your duty to return a verdict of guilty of rape. If you do not so find or have a reasonable doubt as to one or more of these things, you will find the defendant not guilty of rape."

[35] We think that the instruction on the charge of rape was correct and was given in a manner calculated to aid the jury in understanding the case and in reaching a correct verdict.

Defendant objects to the trial judge's failure to include in his charge certain evidence which defense counsel elicited on cross-examination.

Defendant points to the following omissions which he claims favored defendant, to wit:

"1. That she is nearsighted and need glasses. That she was not wearing glasses when her attacker was standing in the doorway. (R p 28)

2. That the prosecuting witness had a look at Alton Henderson in police custody for five minutes before she was able to recognize him. (R p 29)

3. That the prosecuting witness did not notice the next day that any injury was done to the door or the locks. (R p 32)

4. That she was unable to recognize the color of the shirt of the man attacking her. (R pp 33-34)

5. That the prosecuting witness had made an earlier statement inconsistent with her statement that she was knocked out of the bed. (R p 42)"

[36] The general rule is that objections to the charge in stating contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction. However, this rule does not apply where contentions are given by the Judge which are based on unintroduced evidence, which erroneously recite defendant's testimony, or which misstate the burden of proof to defendant's prejudice. See 3 N.C. Index 2d, Criminal Law § 163, and cases there cited.

The matters of which defendant complains are within the general rule requiring counsel to bring their omission to the court's attention. It should also be noted that the record reveals that at the time prosecuting witness stated she was nearsighted, she also stated, "I know I see very

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That the prosecuting witness did not
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five minutes before she identified
recognizing him. [Tr. p. 39]

That the prosecuting witness did not
ify the exact day that any injury was
e to her eye or eyes. [Tr. p. 37]

That she was unable to recognize the
lor of the shirt of the man attacking
r. [Tr. p. 29]

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well close with my glasses off, with the glasses off I do not see distances." The other more compelling omission concerning the length of time that she observed defendant at the confrontation at the Sheriff's Department was explained in the following manner:

"A. Sir, I knew the moment I saw him that he was, but I stood there and looked because I knew how important it was, and I wanted to make very sure in my own mind if that was the man."

[37] Whether prosecuting witness recognized the color of her assailant's shirt, caused the damage to her left eye and made inconsistent statement concerning being knocked off the bed by her assailant do not appear to be of crucial importance to defendant's defense.

Certainly a contextual reading of the entire charge fails to show that the charge was weighted in favor of the State or that the omission of the matters here complained of amounted to an expression of opinion by the trial judge in violation of G.S. § 1-180.

This assignment of error is overruled.

Finally, defendant contends that the death sentence was illegally imposed and that it constituted cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.

[38] In State v. Waddell, *supra*, this Court declared that upon conviction, the death penalty would be imposed upon any person who committed the crimes of larceny in the first degree, first degree murder, arson or rape after 18 January 1973. On 25 February 1971, this Court decided the case of State v. Jarrette, N.C., 282 S.E. 2d 721. In *Jarrette* the Court reaffirmed the holding in *Waddell* and answered all the viable contentions presented by defendant's brief and argument concerning the death penalty. See also State v. Dillard, *supra*, and State v. Noell, *supra*.

We have again carefully considered all of the arguments which were forcefully presented by defendant's counsel. However, we do not find them sufficiently persuasive to warrant disturbing the holdings in *Waddell* and *Jarrette*.

Because of the imposition of the death penalty in this case, we have carefully examined the entire record and every contention and argument proffered by defendant. Our examination discloses that defendant received a fair trial, free from prejudicial error.

No error.

BOBBITT, C. J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N.C., 282 S.E.2d 721 (1981).

STATE of North Carolina

v.

Joe BRYANT.

STATE of North Carolina

v.

Raymond Mitchell FLOYD.

No. 24.

Supreme Court of North Carolina.

March 13, 1974.

Defendants were convicted before the Superior Court, Mecklenburg County, John R. Friday, J., of intentionally disseminating obscenity in public place, and they appealed. Following finding of no error by Court of Appeals, 16 N.C.App. 456, 192 S.E.2d 693, and dismissal of appeal and de-